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FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 72-1185

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO. AND THE ASSOCIATED BELL SYSTEM COMPANIES Charges for Interstate Telephone Service, Transmittal Nos. 10989 and 11027	Docket No. 19129

MEMORANDUM OPINION AND ORDER

(Adopted December 20, 1972; Released December 29, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. We have before us two pleadings: one, a "Motion to Establish Schedule" filed on November 28, 1972 by the Trial Staff;[1] and the other a "Motion to Stay the Commission's Order of December 8, 1972, and for an Order Requiring AT&T to Submit Additional Data In Support of its Interim Rate Schedule As Requested by Pending Pleadings", filed by Microwave Communications, Inc. (MCI) on December 14, 1972. Inasmuch as the latter pleading requests a "stay", we shall discuss it first.

2. The relief requested by MCI is that we "stay" our Order, released December 8, 1972, herein, by which we set December 21, 1972 as the date for comments by parties to this docket on the proposed interim rate schedule submitted by the American Telephone and Telegraph Company (AT&T); that we order AT&T to submit additional data in support of said proposed rate schedule; and that, after receipt of such additional information we fix another date for comments on the proposed rate schedule "and the supporting materials filed by AT&T." Because of the nature of this pleading, we need not await the receipt of any opposition pleadings before acting thereon.

3. In our Order released December 8, 1972 (FCC 72-1102), we stated that AT&T had submitted a proposed interim rate schedule to implement our decision herein of November 22, 1972 (FCC 72-1509). This proposed rate schedule (with supporting and explanatory statements) was served on the parties by AT&T and we invited comments thereon by those parties who wished to do so by December 21, 1972. Therefore, our Order was clearly an interlocutory order in this case in which we specified a date for comments on a rate proposal. Although MCI characterizes its pleading as a motion to "stay", none of the showings required to support a motion for a stay, such as, irreparable injury, likelihood of prevailing on the merits, etc. has been made by MCI.

[1] We also have before us and have considered the opposition of AT&T and USITA to this motion and MCI's statement in support thereof.

109-024—73——1

MCI's pleading is, in substance and effect, a petition for reconsideration and modification of our interlocutory order and such petitions are expressly barred by Section 1.106 of our Rules. Accordingly, for this and the other reasons stated herein we shall deny MCI's request.

4. MCI makes no contention that our basic rate of return decision of November 22, 1972 is in error or that we should stay the effectiveness of that decision. To the contrary, MCI states "we are not contesting AT&T's need for additional revenues, and we do not dispute the Commission's conclusion in this regard." (See footnote [3], page 7.) MCI's principal justification for its pleading is that the statement of AT&T in support of its proposed rate adjustments is "so brief, incomplete, and insubstantial that it is impossible for us to comment on it effectively—or, we believe, for the Commission to review it intelligently."

5. We disagree. In the material served on MCI and the other parties, AT&T set forth fully the specific rate changes it proposes to make and the reasons why it is proposing these specific changes and explains in detail why it is not making the kind of changes MCI wants made, i.e., increases in rates for private line service. In addition, AT&T furnished to the Commission extensive work papers and back-up documents to support its proposal. This material consists of: (a) four volumes of Traffic and Revenue Data that includes estimates of the effects of the rate change on traffic and revenues, explanation of the basis for estimates of effects of the MTS rate change upon MTS traffic and revenues, the interstate MTS demand model, and effects of rate changes upon traffic and revenues and related working papers; and (b) four volumes of detailed cost data. Pursuant to Sec. 0.455(11) of our rules, all of this data are public documents that have been available and will continue to be available to MCI and others for examination not only in preparation of comments on the proposed filing, but in the further proceedings in this docket. Accordingly, we see no sound reason why MCI and the other parties cannot effectively comment on these rate proposals by December 21 as our Order requires.

6. The nearest thing to an allegation by MCI of irreparable injury if we should deny the requested relief is contained in paragraph 9 of the pleading. This statement is as follows:

> If it is eventually found the AT&T has shunted nearly all the increase in revenues onto its monopoly services in order to permit it to cross-subsidize its competitive services—as we believe will be the case—and if the Commission then orders refunds to the users of MTS and WATS, *this will not compensate MCI for the customers it has lost to services sold by AT&T at unreasonably low rates, or for the inhibitions imposed upon its ability to expand its facilities to the optimum, or for all the other consequences of this anti-competitive conduct which will have been made possible by the Commission under the guise of interim rates and an accounting order which never had any possibility of redressing the injury to us, and to others who hope to compete in the business and data communications market. The Commission must face up to this fact of competitive life.* (Our italic).

7. Apart from the fact that this statement by MCI appears relevant to the question of whether we should permit the proposed rate schedule to become effective and not to whether we should "stay" our December 21, 1972 date for comments, it constitutes suppositious allegations and innuendos that are mere conclusions totally unsupported by any factual showing. Thus, MCI makes no factual showing that, if we

should allow this particular rate proposal to become effective as an implementation of our November 22, 1972 decision, there would be any loss or threat of loss of MCI customers to AT&T as alleged by MCI nor does MCI make any factual showing that such rate proposal, if made effective, would inhibit MCI in its ability to expand its facilities to the optimum nor does MCI show what the "other consequences" of making such a rate schedule effective would be. We believe that we should emphasize that such conclusionary allegations, unsupported by any factual showing, are unacceptable and unpersuasive to the Commission, and that we will expect factual showings in any future pleadings that rely upon assertions that rate proposals have anti-competitive effects. It is the Commission's policy and objective to permit and encourage entry into the field of specialized services in order that existing and new common carriers may have the opportunity to compete for that market on a full and fair basis. On the other hand, we cannot be expected to take regulatory action on the basis of bare, naked conclusions that a particular rate or rate proposal is or may be anti-competitive, in derogation of the Commission's policies.

8. The Trial Staff's "Motion to Establish Schedule", (which was filed before AT&T submitted its rate proposal) suggests that: (a) AT&T be required to serve all parties with a copy of its rate proposals and "such justification therefor as it believes appropriate" (b) AT&T be required to show how it determined that the proposed schedule would produce $145 million in additional net income, the factual considerations which led to the specific proposal, a demonstration of how such schedule is just, reasonable and non-discriminatory as between different classes of MTS, and the factual and other bases for apportioning the increases among MTS and other classes of services; and (c) a date be fixed for further hearings for the taking of "testimony and other evidence as to matters with respect to which there is substantial factual difference which cannot reasonably be resolved on the basis of written exchanges or pleadings."

9. The first two "suggestions" of the Trial Staff have already been satisfied in that AT&T did, in fact, serve all of the parties with its rate proposal and its justification therefor and it has addressed specifically the matters referred to by the Trial Staff. Moreover, we have, by order, fixed December 21, 1972 as the date for the parties to submit comments on the proposal. As to the third suggestion, the Trial Staff does not identify the kinds of questions that could involve "substantial factual differences" requiring an evidentiary hearing. As suggested by the Staff, we believe that if any such differences arise they can be resolved by written exchanges or pleadings. Accordingly, we see no need to fix a date for any such hearing.

10. Accordingly, in view of the foregoing, the aforementioned pleadings of MCI and the Trial Staff ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-44

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO. AND THE ASSOCIATED BELL SYSTEM COMPANIES Charges for Interstate Telephone Service, Transmittal Nos. 10989 and 11027	Docket No. 19129

MEMORANDUM OPINION AND ORDER

(Adopted January 10, 1973; Released January 12, 1973)

BY THE COMMISSION: CHAIRMAN BURCH CONCURRING IN THE RESULT; COMMISSIONERS JOHNSON AND H. REX LEE DISSENTING.

1. On November 22, 1972, we issued our Decision and Order [1] in Phase I (rate of return) of this proceeding. This decision allowed AT&T to raise its rates $145 million in order to achieve an overall rate of return of 8.5%. Pursuant to the Decision and Order, AT&T filed a proposed rate schedule for Commission review on December 1, 1972. This proposed rate schedule, with supporting and explanatory statements was served on the parties by AT&T.

2. AT&T's proposed interim rate schedule may be described as follows:

I. *Message Toll Service (MTS)*

The initial period rates for Operator Station messages are increased by five cents for Day messages at distances of 41–196 miles and Evening messages at 41–55 miles. Initial period rates for Operator Person messages are increased by five or ten cents at most distances from 1–244 miles. Additional minute rates, which are the same for Operator Station and Person messages, are increased by amounts ranging from one to four cents at distances of 56–70, 125–148, and most distances over 292 miles during the Day rate period. During the Evening rate period additional minute rates are increased by five cents at distances of 149–244 and 676–1360 miles.

Initial period rates for Dial Station messages during the Day period are increased five cents at distances of 41–196 miles and five cents or ten cents for distances over 430 miles. Additional minute rates are increased one to four cents at most distances over 40 miles.

No changes are proposed for Dial Station messages during the Evening, Night, or Weekend calling periods.

II. *Wide Area Telecommunications Service (WATS)*

The interstate WATS monthly access line and usage rates are increased across the board by approximately two percent. For example, the full time rate for Washington, D.C. WATS users subscribing to Area 1 service is increased from $500 to $510 a month.

3. By Order released December 8, 1972,[2] we informed the parties to this proceeding that they could file any comments they wished to sub-

[1] FCC 72-1059.
[2] FCC 72-1102.

mit on this proposal by December 21, 1972. A Public Notice [3] was released on December 7, 1972 advising all other interested persons that they could also file comments on this rate proposal on or before the same date. Comments opposing AT&T's rate proposal were filed by the Common Carrier Bureau's Trial Staff, Microwave Communications, Inc., Commonwealth of Pennsylvania, United Video, Inc., City of Chicago, and DASA Corporation (hereinafter referred to as "petitioners"). Supporting AT&T's rate proposal were the United States Independent Telephone Association, the Air Transport Association of America, and the networks (ABC, CBS, and NBC). AT&T replied to the adverse comments on January 2, 1973.

4. The essential and single issue before us at this time is whether AT&T has made a sufficient showing that its proposed rate schedules have been reasonably designed to afford it the revenue relief in the amount we determined in Phase I of this proceeding to be required. If this issue is resolved in the affirmative, then, in accordance with the procedures we have heretofore established to govern this proceeding, such proposed rates may be allowed to become effective on an interim basis subject to further hearings as to the lawfulness of the specific components of the revised rate schedules and subject, further, to our decision in Docket No. 18128. As interim rate schedules, their application will also be subject to accounting procedures and future refunds in the event and to the extent that our determinations in Phase II of this proceeding and in Docket No. 18128 may require such refunds. Thus, our decision of November 22, 1972 contemplated that we would allow AT&T to increase its earnings by filing a rate schedule on an interim basis with full recognition that it would be clearly impossible to resolve all questions of lawfulness that might be presented as to rate level and rate structure until we have concluded the proceeding in Phase II and Docket 18128. Pending those ultimate determinations, the accounting and refund provisions are designed to protect the public in the manner provided in Section 204 of the Act. It is true that we stated that we expected AT&T's interim rate proposal to be "consistent with sound rate-making principles". However, in view of the foregoing questions involved in Phase II and Docket 18128, it would be an obvious contradiction for us to rule that we would allow interim rates to go into effect only if we first found, as a condition precedent to the filing thereof, that such rate proposal was consistent in all respects with sound rate-making principles. Accordingly, we reject at the outset the contention of certain parties that we must reject the rate proposal because it is inconsistent with the rate-making principles which those parties consider to be sound. We expressly reserve for further hearing the question of whether or not the AT&T rate proposal is in accord with proper rate-making principles.

5. The adverse comments essentially raise three basic questions: (1) whether AT&T's rate proposal, after taking into account (a) shrinkage and shifts in demand as a result of increased rates, (b) changes in settlements with independent telephone companies, and (c) cost savings as a result of changes in demand, is reasonably designed to produce the authorized $145 million increase in net earnings before Fed-

[3] Report No. 8209.

eral income taxes, (2) whether AT&T's choice as to the particular rate elements to be increased is properly supported, and (3) whether the revenue increase should be obtained by raising rates for all services, rather than just MTS and WATS service. We will discuss each of these questions in turn.

6. Certain of the petitioners argue that the proposed rate schedule is not supported by data or other factual material sufficient to constitute a reasonable showing that the proposed rate adjustments would yield $145 million in increased income. We do not question the immediate relevance of this argument. However, it appears that petitioners premise their argument on a misunderstanding of the context in which we authorized the Bell System to increase its net income before taxes by $145 million. That determination was not made, as suggested by petitioners, on the basis of a projection of future operating results. Rather, such determination was premised on our analysis of recent or past operating results, data of record in the proceeding, including trends indicated by such data which indicated a going level of interstate earnings of about 8.0% and a requirement of $145 million of additional revenue to increase that going level to 8.5%. In other words, consistent with the methods applied by the Commission in formal and informal revenue requirement proceedings in the past, the calculation of $145 million properly and primarily is predicated on current and past traffic volumes rather than projected traffic volumes. Also, consistent with prior procedures, any rate adjustments to produce an increase or reduction in the going level of earnings by a given amount is required to take account of the revenue and cost effects estimated to be produced by those adjustments on traffic patterns, i.e., shrinkage and shifts among message classifications.

7. AT&T submitted the data and work papers underlying its calculations designed to show that the rate proposals would produce the $145 million authorized by the Commission. The data indicate that a repricing of current traffic at the proposed rates would produce additional annual revenues of $184 million. The material submitted also shows the calculations of the effect of the proposed rates on traffic, independent telephone company settlements and costs, which reduce the gross repricing effect of the proposed rates to $145 million. In arriving at its estimate of the set of rates intended to produce the $145 million, AT&T utilized an econometric model for purposes of making assessments of probable customer reactions to the rate changes in particular parts of the structure, taking into account various general economic changes. Our staff has not verified in detail all of the procedures and computations undertaken by the AT&T technicians in structuring and applying the model. However, the utilization of the model appears to be a serious attempt by AT&T to employ modern quantitative techniques for purposes of making reasonable estimates of the ultimate revenue effects of complex interactions involving customer responses, economic growth and other related phenomena. Moreover, our staff has made certain independent calculations to test the reasonableness of AT&T's results. We are satisfied that we have sufficient information before us to warrant our conclusion that the proposed rates are reasonably designed to produce the additional net income before Federal income taxes of $145 million authorized in our

decision. In any event, the parties will have an opportunity to examine the effectiveness and reliability of AT&T's econometric model in Phase II of this proceeding in connection with the evaluations therein of the reasonableness of the MTS rate structure.

8. Among the specific contentions made by the parties that the rate schedule is inconsistent with sound rate-making principles, is that AT&T gave no reason in its supporting statements for increasing the initial three-minute rate in some mileage bands, and the additional minute rate in other (though sometimes the same) mileage bands, while imposing no increases in still other mileage bands. In its response to the comments AT&T states that the rates were designed to produce the authorized $145 million increase in income without increasing any individual rate above the level proposed in Transmittal No. 10989 filed November 20, 1970, and that these constraints would preclude increases across the board. The main thrust of the adverse comments is devoted to AT&T's failure to apportion some of the revenue increases to its private line services. AT&T's response to this is that the proposed rate increases constitute approximately a 2.1% increase for MTS and a 2.0% increase for WATS, and that this is far less than the 3.6% May 4, 1972 private line rate increases. Petitioners argue that the May, 1972 private line increase should not be considered as offsetting both the proposed MTS increase and the even larger one of January, 1971; and that it is irrelevant that private line rates have increased more than MTS rates, since, in petitioners' view, private line rates have been too low all along. However, as we have stated in paragraph 4 hereof, we are not ruling on these particular contentions at this time. The questions of whether AT&T can properly support its choice of the particular rate elements increase or can support its decision not to increase the private line service rates are matters to be resolved in Phase II herein and in Docket 18128. We hold only that AT&T has given sufficient reasons in support of the proposed rate schedule to warrant our allowing it to be filed as an interim rate schedule subject to accounting, refunds and further hearings as to the lawfulness thereof.

9. For the reasons stated above we will allow AT&T to file its proposed rate schedule. In the case of the MTS rates, the filing shall be on not less than 10 days' notice in order that AT&T can give adequate prior newspaper notice to the public of such increases. Since the proposed increased WATS rates, unlike the MTS rates, have not heretofore been filed with the Commission [4] we shall require them to be filed on not less than 60 days' notice pursuant to Section 61.58 of our Rules and Regulations. Additionally, after being filed, we expect to order suspension of the WATS increases, pursuant to Section 204 of the Communications Act, for the full 3-month period set forth therein.

10. Accordingly, in view of the foregoing, IT IS ORDERED, That AT&T is hereby given permission to file its proposed MTS rate schedule on not less than 10 days' notice and its proposed WATS rate schedule on 60 days' notice.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[4] The increased MTS rates were originally filed under Transmittal No. 10989, on November 20, 1970.

F.C.C. 73-64

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF BIRCH BAY BROADCASTING CO., INC., LICENSEE OF STATION KARI, BLAINE, WASH.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 22, 1973)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability, dated July 26, 1972, addressed to Birch Bay Broadcasting Company, Inc., licensee of Radio Station KARI, Blaine, Washington; and (2) the licensee's response to the forfeiture notice, dated August 31, 1972.

2. The Notice of Apparent Liability stated that an inquiry by the Commission into the operation of Station KARI revealed that certain announcements were broadcast over KARI in apparent violation of Title 18, United States Code, Section 1304, which prohibits the broadcast of advertisements of or information concerning "any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance . . ."

3. The Notice of Apparent Liability stated that according to tape recordings supplied to the Commission, the licensee conducted a remote broadcast from a booth at the Northwest Washington Fair, held in Lynden, Washington, in August 1971. On August 18, 19, and 20, 1971, announcements were broadcast on KARI urging listeners to attend the fair and register at a booth for a drawing for three prizes. It appears that the price of admission to the fair was $2.50 for adults and $1.50 for children. Two winners of prizes stated to the Commission that they had paid admission to the fair, had registered at the booth for the drawing, and that they had heard of their names being announced on KARI as winners of prizes. Both winners later received letters from KARI stating where they could pick up their prizes. The winners stated that although they were not required to be present at the drawing in order to win, it was necessary to attend the fair in order to register for the drawing.

4. Additionally, subsequent remote broadcasts similar to the one above were conducted from the Pacific National Exposition (PNE) held in Vancouver, British Columbia. Between August 21 and September 6, 1971, the licensee broadcast announcements from a booth at the Exposition inviting listeners to attend and register at the World Vision of Canada (WVC) booth for a drawing to be held each day.

The winners received a free phonograph record from the WVC. Participants were required to attend the PNE, the price of admission to which was $1.50 for adults and $0.25 for children. The drawings were conducted on August 25, 26, 27, and September 3 and 4, 1971. The names of the winners were broadcast each day over KARI.

5. In both instances above, prizes were awarded based upon chance, by means of the drawing of names from among only those registered at the booths, and the participants were required to pay admission in order to register. Thus, it appears that all three elements of a lottery existed, i.e., prize, chance, and consideration, and that the broadcasts of August 18, 19, 20, and August 21 through September 6, 1971, were in violation of Section 1304, Title 18, U.S.C.

6. The forfeiture notice also alleged that an examination of KARI program logs revealed violations of the Commission's logging rules. Certain foreign language programs broadcast on Saturdays and Sundays were entered on the logs without the names of sponsors or advertisers, and such names were entered at a later date. Specific examples of this practice follow:

Date of program log	Name of program	Date sponsor entries were made on logs
1/ 8/72	Musical Rhapsodies	1/11/72
1/ 9/72	Musical Rhapsodies	1/11/72
2/ 5/72	Greek Voice of the West	2/18/72
2/ 6/72	Musical Rhapsodies	2/18/72
2/13/72	Musical Rhapsodies	2/18/72

Although only a few examples are set forth above, this appears to have been a common practice with respect to foreign language programs originating in the station's studio in Vancouver, British Columbia. It appears that the names of the sponsors were either phoned in or mailed on a Friday from Vancouver. During the Commission inquiry, James McGechean, KARI salesman in Vancouver, stated that when the names were mailed to the station on a Friday, the station would not receive them until the following week, long after the program was broadcast. The employee in charge of typing the program logs confirmed this during the field investigation and also stated she initialed and dated the entries on the logs for the dates listed above. As we stated in the Notice of Apparent Liability:

> Thus, it appears that the practice of entering the names of sponsors on logs several days after the programs have been broadcast and without any explanation being made is in violation of Section 73.112(d)(1) of the Commission's Rules and Regulations. Although the Rule provides that corrections or additions may be made on logs after they have been signed, the Rule provides that explanation must be made on the log or on an attachment to it, dated and signed by either the person who kept the log, the station program director or manager, or an officer of the licensee.
>
> Aside from the fact that the subsequent additions to the logs here were made without explanation and by the person who had typed the logs instead of the persons authorized to correct them, it should be pointed out that our purpose in authorizing any kind of later addition or correction to logs was to permit correction of occasional errors or isolated additions to the pretyped log rather than to authorize regular use of incomplete logs which remain in this condition until a later date.

7. The licensee states in its response to the Notice of Apparent Liability that in reference to the lottery at the Northwest Washington Fair, the licensee merely provided a convenient receptacle for the placement of names of those who participated in the drawing for the prizes. Additionally, the licensee states that it sought no promotional advantage, but simply joined in the spirit of general activity of the fair. Although the licensee states that the value of the prizes was $10.00 each, information obtained by the staff indicates the retail value of each was $20.00.

8. The licensee further states in reference to the lottery conducted at the Pacific National Exposition (PNE) that the Comptroller of the PNE advised the licensee that 35 per cent to 40 per cent of all people admitted to the exposition were admitted free and only a person's presence at the exposition was required for registration, regardless of whether he had paid an admission charge.[1]

9. In response to the allegation of logging violations, the licensee states that with respect to remote broadcasting from its studio in Vancouver, British Columbia, sponsorship identification was mailed to the station each week and entered in the log after the foreign language program was aired, and that because of irregularity in mail delivery the information reached the station and was entered in some cases as late as 10 days after the date of the particular program sponsored. The licensee states that although the logging practice was not in strict compliance with the Commission's Rules and Regulations, it was not a deceitful practice. The licensee reiterates its plans for correcting its past logging procedures.

10. The licensee's reply to the forfeiture notice has provided no material facts which were not considered by the Commission in its assessment of the forfeiture in this case, and we believe that the licensee has failed to advance sufficient reasons to justify remission or reduction of the amount of liability assessed in the Notice of Apparent Liability.

11. In view of the foregoing, IT IS ORDERED, That Birch Bay Broadcasting Company, Inc., licensee of Radio Stations KARI, Blaine, Washington, and KERI–FM, Bellingham, Washington, FORFEIT to the United States the sum of five thousand dollars ($5,000) for violation of Section 1304, Title 18, U.S.C. and Section 73.112, of the Rules. Payment of the forfeiture may be made by mailing a check or similar instrument drawn to the Order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of receipt of this Memorandum Opinion and Order.

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[1] The Commission held in *Laury Associates, Inc.*, 27 FCC 2d 870, that a paid admission to a fair was consideration. In addition the Commission held in *Taft Broadcasting Co.*, 18 FCC 2d 186; *WBRE–TV, Inc.*, 18 FCC 2d 96, and *Bob Jones University*, 18 FCC 2d 8, that where it appeared that free participation was not available to all of those entering a contest and where some did in fact pay, the element of consideration was present, thus constituting a lottery. In the present case, the licensee identified groups that were admitted free at PNE including the "Golden Agers", the handicapped, members of the armed forces, school children, and staff members, exhibitors and VIPs. However, by the licensee's admission, at least 60% of those attending the exposition paid an admission fee.

12. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Birch Bay Broadcasting Company, Inc., licensee of KARI, Blaine, Washington.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-69

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF BREMEN RADIO CO., LICENSEE OF
RADIO STATION WWCC, BREMEN, GA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 22, 1973)

BY THE COMMISSION:

1. The Commission has under consideration (a) its Notice of Apparent Liability, dated April 5, 1972, notifying Bremen Radio Company, licensee of Station WWCC, Bremen, Georgia, of its apparent liability for a forfeiture of three thousand dollars ($3,000); (b) Bremen's response to the Notice submitted by its counsel under date of June 27, 1972; (c) a Commission letter to the licensee dated October 31, 1972, and (d) the licensee's response to that letter dated November 7, 1972.

2. The Notice of Apparent Liability was issued pursuant to Section 503(b)(1)(D) of the Communications Act of 1934, as amended for violation on November 16, 17, 18 and 19, 1971 of Section 509(a)(4) of the Communications Act by broadcasting or participating in the broadcasting of a radio program, knowing or having reasonable ground for believing that, in connection with a purportedly bona fide contest of chance, constituting a part of such program, one or more persons with intent to deceive the listening public had engaged in an artifice or scheme for the purpose of prearranging or predetermining in whole or in part the outcome of such purportedly bona fide contest of chance as proscribed by Section 509(a)(3) of the Act.

3. The Commission's investigation revealed that a "turkey shoot contest" was broadcast on WWCC approximately once each hour beginning November 16, 1971; that the station broadcast an invitation ten times per day for members of the public to participate by calling the station immediately; that they were told that if they "shot" the turkey they would win a turkey and that,

> You could be the lucky winner of a free turkey. All you have to do is to be the first to call WWCC when we play the game. If you shoot a turkey, you win a turkey . . . win a free turkey.

Prior to the beginning of the contest, a tape recording cartridge had been prepared containing the following animal sounds in the order here listed: owl, crow, sheep, rooster, dog, cow, horse, duck, pig, crow, camel, turkey.

4. After making the opening announcement for each broadcast of the contest, the announcer would play a recorded commercial message

on behalf of one of the merchants sponsoring the contest. While this message was being broadcast, the announcer would accept a telephone call, and at the end of the commercial he would play an excerpt from the animal-sound recording. The sound of each animal was preceded by the sound of rifle shots. After an animal sound was played, the announcer would identify the animal and tell the contestant whether he had won or lost, depending upon whether the sound of a turkey gobble had been broadcast. Although listeners were led to believe that they might win a turkey during each broadcast, it appears that the contest was so conducted that no more than one person could win per day, at least on November 16, 17, 18 and 19. A person employed as an announcer at WWCC during the first four days of the contest has stated that he was instructed to permit no more than one person to win the contest per day. He stated that these instructions were given to him by Thaddeus K. Brown, who is manager of the station and a vice president, director and 30 per cent owner of the licensee company, and by Larry Wayne, program director-announcer at WWCC. Brown and Wayne have denied that they so instructed the announcer or any other employee. However, Wayne, who prepared the sound effects tape and himself aired many of the contest broadcasts, stated that there could be only one winner per day because the animal sounds were to be played in sequence as they were recorded on the tape. Since twelve sounds were recorded—only one of which was the winning sound of a turkey—and since the contest was conducted only ten times per day for three days and only twelve times on the fourth, it is clear that if the sounds were played in sequence there could be a maximum of one winner per day.[1] Brown stated that he had given instructions to "spin" the tape cartridge at the end of each day's broadcast schedule, in order to create the element of chance as to which animal sound would come up the following morning. However, all of the station's announcers denied having received such instructions, and all, including Wayne, stated that they had played the tape in sequence without spinning it. Moreover, even if the cartridge were spun at the end of the day, only one person could win on the following day if the sounds were played in sequence, since only one of the twelve sounds on the tape was that of a turkey. Thus, when a contestant won a turkey in the morning—as sometimes occurred—all other contestants thereafter on that day were denied an opportunity to win, although the promotional announcements for the contest and the announcements given during the contest itself indicated that any contestant might win.

5. The statements of Brown and Wayne were contradictory to that of the former announcer as to whether instructions were given the announcer to permit only one winner per day. A part-time announcer at the station, Philip Coley, also denied that he had received such instructions, but stated that he always played the tape in sequence from the point it had reached when he came on duty. The statements of Brown and Wayne themselves were at variance as to whether Brown instructed Wayne to spin the tape at the end of the day. Brown denied that he knew how many sounds were on the tape, and stated that he

[1] The list of winners furnished to the Commission for the first four days of the contest revealed that four persons had won turkeys during this period—apparently one per day.

left the preparation of the tape to Wayne, but the Commission's investigators noted during their visit to the station on November 20, 1971, that a list of the sounds in their sequence was pasted on the cartridge rack which was located next to the console in the control room. Brown denied on November 20 that he had seen this list, but Wayne and the two announcers were well aware of it, and the investigators noted that it was easily visible through the control room window from the front office of the building. The Commission also received evidence that the list had been posted since the contest began on November 16.

6. Although there was conflicting evidence on certain aspects of this case, the Commission found substantial evidence that the outcome of the contest was at least in part prearranged or predetermined with intent to deceive the listening public. It appeared that there were twelve animal sounds on the tape, that only one sound would produce a winner, that the sounds were played in sequence throughout the day, and therefore that no more than one person could win the contest per day, although listeners were falsely led to believe that a participant might win any of the broadcasts of the contest, even after someone else had won on any given day. The Notice of Apparent Liability pointed out that even if the manager-vice president-director-stockholder, Brown, were given the benefit of the doubt regarding the conflicts in statements made by him and others, the licensee was responsible for the acts of its employees, and the program director, whom Brown placed in charge of the contest, knew that only one person might win per day and that the announcements used in connection with the contest indicated that there might be a winner during each broadcast.

7. In view of conflicting statements by some of the persons having knowledge of the case, the Commission stated in its Notice of Apparent Liability that it would consider a request by the licensee that the matter be designated for an evidentiary hearing to determine all of the facts.

8. The licensee's response makes no request for an evidentiary hearing, but requests that the forfeiture be rescinded or reduced in amount. In its "Statement of Facts," the response states that Brown told Wayne to prepare a sound effect tape with animal sounds, including the sound of a turkey; that Brown gave no instructions as to the number of sounds to put on the tape and was not aware of the number of sounds on the tape; that Brown "instructed personnel to spin the tape daily to get the sounds out of sequence so that no one, including the station personnel, would know when a turkey sound would play"; that a recently-hired announcer, Michael Davis, posted the list of animal sounds on the cartridge rack without instructions to do so; that the rack can be rotated so that the side containing the list of sounds could not be seen from the front office or the manager's office, and Brown did not know of the existence of the list until the day the Commission's investigators visited the station; and that prior to the beginning of the contest Brown had purchased twelve turkeys and made provision to obtain more when needed, although the contest was to run for only nine days.

9. The licensee states that Section 509 of the Act is a criminal statute, and that the violation defined therein includes "two elements, (1) knowledge or reasonable grounds for believing that a purportedly bona

fide contest has been prearranged or predetermined and (2) the intent to deceive." The licensee contends that Brown had no knowledge or reasonable ground for believing that the contest was other than bona fide, and thus "An essential element of the offense is lacking, and no penalty can be assessed" because "The presumption of innocence surrounds the accused like a cloak, and can be overcome only by clear and convincing proof that will convince the Commission beyond a reasonable doubt, of the guilt of the licensee."

10. The licensee also contends that there is no evidence of intent to deceive and that the evidence relied on by the Commission is,

> The statement by the former employee [Davis] that he was instructed to allow only one winner per day, and the list of sounds posted on the cartridge rack. The statement is denied by all personnel, and other announcers say they were not so instructed. The list was posted without notice to anyone by the same employee, who then is alleged to have filed the complaint. The so-called substantial evidence wholly fails to prove any intent to deceive or any knowledge of prearrangement or predetermination.

The licensee also reasserts that the manager, Brown, had ordered twelve turkeys and made arrangements to obtain more, and contends that this fact alone "negates any knowledge by management or prearrangement or predetermination to limit winners to one per day." In answer to the Commission's statement in the Notice that a licensee is responsible for the acts of its employees, the licensee contends that it was "the victim of the vengeful acts of a disgrunted employee who had been reprimanded, recommended for termination and placed on probationary status."

11. The licensee also contends that if it is held liable for a forfeiture, the amount should be reduced to not more than $250 because of the small size of the station and its income and because, in view of "the extremely doubtful nature of the evidence" against it, "the alleged offense should not be considered as a continuing offense, but at most a single offense."

12. In response to a letter of further inquiry from the Commission, the licensee by counsel in a letter dated November 7, 1972, stated that it had not purchased the rights to the contest or material connected therewith from any other party, but itself had originated all material used in connection with the contest. The licensee stated that the promotional copy for the contest was written by the manager, Brown, and that the copy intended to be used in introducing each contest as written by Brown had begun,

> IT'S TIME FOR THE WWCC "TURKEY SHOOT CONTEST." BE THE FIRST TO CALL AND PLAY THE GAME. IF YOU HIT A TURKEY WITH YOUR IMAGINARY GUN . . . YOU'LL WIN A TURKEY FROM WWCC. IF YOU HIT ANYTHING OTHER THAN A TURKEY . . . YOU LOSE.

The copy written by Brown for the closing announcement in each contest, as submitted November 7, 1972, began:

> LISTEN AGAIN SOON FOR ANOTHER "TURKEY SHOOT CONTEST" AND BE THE FIRST TO CALL WWCC FOR A CHANCE TO WIN A FREE THANKSGIVING TURKEY. REMEMBER, IF YOU HIT A TURKEY, YOU WIN A TURKEY. IF YOU DON'T HIT A TURKEY, YOU LOSE . . .

The licensee stated that the recording furnished by the licensee to the Commission's investigators during their visit to the station had been

made by former announcer Davis, who, licensee asserted, had inserted his own introduction to the contest, which began:

YOU COULD BE THE LUCKY WINNER OF A FREE TURKEY. ALL YOU HAVE TO DO IS TO BE THE FIRST TO CALL WWCC WHEN WE PLAY THE GAME. IF YOU SHOOT A TURKEY, YOU WIN A TURKEY . . . WIN A FREE TURKEY.

Licensee cites the difference in the opening announcements as "one other example of the fact that the apparent violation was caused by this disgruntled employee refusing to obey the instructions of management." However, the Commission is unable to perceive any significant difference in the thrust of the two announcements. Brown's opening announcement included the statement,

BE THE FIRST TO CALL AND PLAY THE GAME. IF YOU HIT A TURKEY WITH YOUR IMAGINARY GUN . . . YOU'LL WIN A TURKEY FROM WWCC.

Brown's closing copy urged listeners to "be the first to call WWCC for a chance to win a free Thanksgiving turkey." Thus, both would lead listeners to believe they could win a turkey during the next broadcast of the contest, whereas as noted in par. 4 above, once a turkey had been won on any given day, no later participant had a chance on that day.

13. Nothing in the licensee's responses appear to justify altering our prior conclusion that, as conducted, the contest was at least in part prearranged or predetermined with intent to deceive the listening public. All three announcers then working at the station and conducting the hourly contest on the air agree that the tape containing the recorded animal sounds was not "spun" at any time but was played in sequence, beginning each day at the point reached at the end of the preceding day. Since there were twelve animal sounds on the recording, only one of which was a turkey sound, and since the contest never was broadcast more than twelve times on any day November 16–19, 1971, inclusive, the outcome of the contest was prearranged or predetermined, at least in part; and since listeners were led to believe that they might win during all broadcasts of the contest, whereas after there had been one winner on any given day there could be no more winners that day, there is clear evidence of an intent to deceive the listening public.

14. Brown denies that he gave instructions to permit only one person to win per day, denies knowledge of how many animal sounds were being used, and asserts that he gave instructions that the tape be "spun" at the end of each day to introduce an element of chance with respect to the following day's broadcasts. As we stated in the Notice of Apparent Liability, however, even assuming, *arguendo*, that Brown is right regarding conflicts in the statements made by him and his employees, the licensee was responsible for the acts of its employees, and the program director, whom Brown placed in charge of the contest, knew that only one person might win each day and that the announcements broadcast indicated that there could be a winner on each broadcast.

15. Not only were Brown's statements partially in conflict with those given by three of his employees, but one statement by Brown was

in conflict with another he later gave the Commission himself. Thus, he stated when interviewed on November 20, 1971, that,

> I told Larry Wayne [program director] to punch up the tape at night, so announcers won't know what's coming up and get tape out of sequence.

However, inspection of the program logs by the staff revealed that Davis, not Brown had worked the last shift on each of the four days of the contest to that point; also Wayne told the Commission staff on November 20 that he did not spin the tape at the end of one day or before the next day began, but rather had given instructions to the other announcers to play the tape "straight through" in sequence. It is significant that in a letter to the Commission dated November 22, 1971, Brown stated that "I instructed my sign-off announcer to bypass a few sounds each night after sign-off to insure no set sequence and to give all listeners an equal opportunity of winning." The "sign-off" anouncer, as Brown knew or should have known, was not Wayne but Davis, who denies having received any such instructions and having "spun" the tape. The third announcer, Philip Coley, likewise denies having "spun" the tape or having done anything except to play it in sequence when he came on duty.

16. There are other conflicts between the statements of the persons having knowledge of the manner in which the contest was conducted. It was for this reason that in our Notice of Apparent Liability we stated that we would consider a request from the licensee that the matter be designated for an evidentiary hearing to determine all of the facts of the case, if the licensee should submit such a request within thirty days of the release of the Notice. However, no such request was received from the licensee within that period nor has been received to this date.

17. On the basis of the information before us, we find that the lisensee violated Section 509(a)(4) of the Communications Act of 1934, as amended, on November 16, 17, 18 and 19, 1971 by broadcasting or participating in the broadcasting of a radio program, knowing or having reasonable ground for believing that, in connection with a purportedly bona fide contest of chance, constituting a part of such program, one or more persons with intent to deceive the listening public has engaged in an artifice or scheme for the purpose of prearranging or predetermining in whole or in part the outcome of a purportedly bona fide contest of chance as prescribed by Section 509(a)(3) of the Act. With respect to licensee's alternative plea that the forfeiture be substantially reduced, it should be pointed out that we took cognizance of the licensee's financial condition before setting the amount of apparent liability in the Notice. The licensee also contends in its plea for reduction of the forfeiture that the offense should be considered "at most a single offense." Section 503(b)(1) of the Act states that "Each day during which such violation occurs shall constitute a separate offense."

18. In view of the foregoing, IT IS ORDERED, pursuant to Section 503(b)(1)(D) of the Act, That Bremen Radio Company, licensee of Station WWCC, Bremen, Georgia, FORFEIT to the United States the sum of three thousand dollars ($3,000) for violation of Section 509(a)(4) of the Comunications Act. Payment of the forfeiture may

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be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Act and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty days of the date of receipt of this Memorandum Opinion and Order.

19. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of the Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Bremen Radio Company, licensee of Station WWCC, Bremen, Georgia.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1144

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re BUCKEYE CABLEVISION, INC., TOLEDO, OHIO (EXPANSION AREA) For Certificate of Compliance and	CAC-291 (OH019)
BUCKEYE CABLEVISION, INC., TOLEDO, OHIO Petition for Special Relief to complete service to certain restricted portions of the discrete area.	CSR-103 (OH019)

MEMORANDUM OPINION AND ORDER

(Adopted December 13, 1972; Released December 19, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND REID CONCURRING IN THE RESULT.

I

1. This matter arose in 1967, when D. H. Overmyer Telecasting Co., Inc., then permittee of UHF television station WDHO-TV, requested the Commission to determine in evidentiary hearing [1] whether the continued carriage of distant television signals from the Detroit-Windsor market on Buckeye Cablevision, Inc.'s system in Toledo, Ohio was in the public interest. By Order of November 22, 1967, the Commission designated the question for hearing and, pending final disposition of the proceeding, required Buckeye to confine delivery of the Detroit-Windsor stations to the areas of Toledo where feeder cable was located on the date of the Order.[2] Buckeye unsuccessfully sought judicial stay of this ruling and because of this litigation the Order did not become effective until February 2, 1968. As a result of the Commission action, only part of Toledo (the "discrete" area) has been wired, while a substantial portion of the community (the "expansion" area) remains without service. The "discrete" area of Toledo consisted of five sectors each of which had been wired to a significant extent.

2. Buckeye continued to wire, arguing that the Order did not prohibit the laying of additional trunk or feeder cable in the sectors (of the discrete area) where trunk and feeder cable were already located. Overmyer alleged that this action was in violation of the Commission's

[1] The designated issues were:
1. To determine the present and proposed penetration and extent of CATV service, including television signals carried, in the market area.
2. To determine the effects of current and proposed CATV service in the Toledo area upon existing, proposed, and potential television broadcast stations in the market.
3. To determine the present policy and proposed future plans of Buckeye Cablevision, Inc., with respect to the initiation of pay-TV operations based upon or in connection with its CATV operations.
4. To determine whether expansion of Buckeye Cablevision, Inc., CATV system should be limited and, if so, the appropriate conditions thereof.

[2] (Docket No. 17882) 10 FCC 2d 745 (1967).

Order, and, pursuant to a petition by Overmyer, the Commission, on December 24, 1968, issued a temporary stay, prohibiting Buckeye from providing Detroit-Windsor signals to any new Toledo subscribers, from cable not constructed and in operation on or before February 2, 1968.[3] Those subscribers served from cable constructed after February 2, were permitted to continue to be served.

3. On November 25, 1969, the Commission clarified its original Order of November 22, 1967, and, using the language of the temporary stay, prohibited carriage of the Detroit-Windsor signals to new subscribers from cable not constructed and in operation on February 2, 1968.[4] Again, service to those who were served from cable constructed between February 2, 1968 and December 24, 1968 (the date of the temporary stay) was grandfathered. The result of this action was to leave within the "discrete" area of Toledo "pockets" where there was either no service or where feeder cable served only those who had subscribed between February 2 and December 24, 1968, but not their neighbors.

4. The evidentiary hearing ordered on November 22, 1967, commenced in March 1968, and continued sporadically during 1968. On December 13, 1968, the Commission adopted its *Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397*,[5] announcing new proposals for resolving the signal carriage question. Pending the outcome of this rulemaking, the Toledo hearing was suspended. Docket 18397 was finally terminated in the *Cable Television Report and Order* on February 3, 1972, and pursuant to paragraph 114(H)[6] of the Order, the evidentiary hearing was subsequently dismissed. Section 76.65 of the Rules was designed to settle the several long-standing controversies where the Commission had limited cable service to discrete areas of a community, and does so simply by providing that expansion of service must be consistent with the new signal carriage rules.

5. We now have before us two items—an application for certificate of compliance to serve the expansion area of Toledo,[7] and a petition for special relief to complete service in the "pockets" of the discrete area of Toledo. We shall treat the application for certificate of compliance first.

II

6. Buckeye's application for certification, filed May 1, 1972, proposes to serve the expansion area of Toledo (market #52) with the following signals:[8]

WTOL–TV (CBS Channel 11), Toledo, Ohio
WSPD–TV (NBC Channel 13), Toledo, Ohio
WDHO–TV (ABC Channel 24), Toledo, Ohio

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[3] (Docket No. 17882) FCC 68–1231.
[4] (Docket No. 17882) 20 FCC 2d 619 (1969).
[5] 15 FCC 2d 417 (1968).
[6] 36 FCC 2d 143, 188 (1972).
[7] In our *Memorandum Opinion and Order in Docket 18397–A*, 34 FCC 2d 304 (1972), we held that expansion of service would be considered as the addition of new signals to an existing system within the meaning of § 76.11(a) of the Rules, and, thus a certificate of compliance is required prior to commencement of operations in the expansion area.
[8] In addition to these signals, Buckeye currently serves the discrete area of Toledo with WWJ–TV (NBC, Channel 4) and WXON (Ind., Channel 62), Detroit, Michigan. Buckeye does not carry, nor does it propose to carry, the signal of WOSU–TV in the discrete area. Buckeye will serve the expansion area of Toledo with head-end facilities separate from those serving the discrete area.

WGTE–TV (Educ. Channel 30), Toledo, Ohio
WBGU–TV (Educ. Channel 70), Bowling Green, Ohio
WXYZ–TV (ABC Channel 7), Detroit, Michigan
WJBK–TV (CBS Channel 2), Detroit, Michigan
WTVS (Educ. Channel 56), Detroit, Michigan
WKBD–TV (Ind. Channel 50), Detroit, Michigan
CKLW–TV (Ind. Channel 9), Windsor, Ontario, Canada
WOSU–TV (Educ. Channel 34), Columbus, Ohio

Carriage of these signals is consistent with the provisions of § 76.63 which is controlling for cable systems in the second 50 major television markets.

7. In addition to the above-listed television signals, Buckeye proposed to carry the distant independent signal of WUAB (Channel 43), Lorain, Ohio, to complete its signal carriage complement as permitted in Section 76.63(a) (as it relates to Section 76.61(b)). The proposed carriage of WKBD–TV was based on the fact that that station was listed as significantly viewed in Lucas County in Appendix B of the *Cable Television Report and Order*.[9] There was no objection to these proposals. On reconsideration, however, WKBD–TV was deleted from the significantly viewed signal list.[10] Buckeye then amended its application to submit an "ARB Special Tabulation Research Report" which, allegedly, showed WKBD–TV as, in fact, significantly viewed. At this point. Overmyer objected to the alleged results and methodology of the study. Thereafter, Buckeye again amended its application (i) to delete entirely the proposed carriage of WUAB, (ii) to delete the proposed carriage of WKBD–TV as a significantly viewed signal, (iii) to add the proposed carriage of WKBD–TV as a distant independent signal to complete its signal carriage complement as permitted in § 76.63(a) (as it relates to § 76.61(b)), and (iv) to dismiss without prejudice Buckeye's previous amendment containing the ARB study. Thus, Overmyer's objection has been rendered moot, and there has been no objection to Buckeye's second amendment.

8. We find that Buckeye's proposed operations in the expansion area of Toledo are in compliance with our rules, including both its proposed signal carriage, as amended, and its plans for availability and administration of access channels and other nonbroadcast cable services, which include dual cable facilities with a minimum capacity of 24 channels and two-way capability. Buckeye's cablecasting plans include origination, and public, educational, governmental, and leased access channels. In light of the above, we will issue the requested certificate of compliance.

III

9. On April 28, 1972, Buckeye filed a petition requesting Commission authorization to complete its existing cable service in the four "pockets" of the discrete area of Toledo.[11] At present, Buckeye states that it serves approximately 1200 out of a possible 6000 subscribers in

[9] 37 Fed. Reg. 3298, 3327 (1972).
[10] 36 FCC 2d 378, 436 (1972).
[11] By 1977, Buckeye will, of course, have to receive Commission certification for the entire city of Toledo, including the discrete area.

these four areas, and that were the Commission's restrictions lifted, it might expect an additional 2900 subscribers. By December 24, 1968 (the date of the Commission's temporary stay), Buckeye had already laid trunk line throughout the pocket areas. Thus, the instant request is not to construct further trunk or feeder cable, but for permission to install drop-lines to those would-be subscribers who have been requesting service since late 1968, and whose neighbors in many instances already receive service. Buckeye's petition has not been opposed.

10. Buckeye would provide the new subscribers in the four pockets with the same television service it provides to the rest of the discrete area of Toledo. This service includes the carriage of WWJ–TV (NBC, Channel 4) and WXON (Ind., Channel 62) Detroit, Michigan (see footnote 8). Carriage of these two signals is inconsistent with the Commission's new signal carriage rules. Buckeye points out, however, that because the discrete area is served from a separate head-end, it is necessary, absent massive rewiring, for the entire discrete area, including the four pockets, to receive the same television service, or none at all.

11. The Toledo situation is singular. As noted above, Section 76.65 of our new cable television rules was specifically designed to deal with the several communities in the country where systems had been prohibited by Commission Order from expanding within their franchise areas. This Section was not intended to deal with the problem of the "pockets" of the discrete area of Toledo. But the time has come for this matter to be resolved. We are dealing with a few thousand subscribers in an overall area with a potential of many thousands. It is not reasonable in this unique case to expect the cable system to embark on a major rebuilding project in the discrete area, merely to eliminate the signals of WXON and WWJ–TV in the four pockets.

12. As a result of our action in Part II of this Memorandum Opinion and Order, permitting cable service in the expansion area of Toledo, the entire city, save the few thousand people in the pocket areas, will enjoy the benefits of cable. This result, of course, would not be in the public interest. Signal carriage, including that of WWJ–TV and WXON, has been grandfathered in the discrete area of Toledo (see Section 76.65 of our Rules). Equity argues that we extend this same protective mantle to the pockets within the discrete areas. To do otherwise here would be anomalous and serve no useful public purpose.

Accordingly, IT IS ORDERED, That, the captioned application for certificate of compliance and petition for special relief filed by Buckeye Cablevision, Inc. ARE GRANTED.

IT IS FURTHER ORDERED, That, the objection to the captioned application for certification, filed by Overmyer Telecasting Co., Inc., is dismissed as moot.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-35

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of CALIFORNIA STEREO, INC., SACRAMENTO, CALIF.	Docket No. 19515 File No. BPH-7668
INTERCAST, INC., SACRAMENTO, CALIF.	Docket No. 19516 File No. BPH-7669
EDWARD ROYCE STOLZ II, TRADING AS ROYCE INTERNATIONAL BROADCASTING, SACRAMENTO, CALIF.	Docket No. 19611 File No. BPH-7924
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 19, 1973)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER DISSENTING TO THE FAILURE TO ADD A SECTION 1.526 ISSUE.

1. Before the Review Board is a petition to enlarge issues, filed July 5, 1972, by California Stereo, Inc. (California Stereo) requesting addition of legal, financial, and cross-interest issues against Intercast, Inc. (Intercast).[1]

LEGAL QUALIFICATIONS ISSUE

2. California Stereo argues that a legal qualifications issue is warranted because Intercast's Articles of Incorporation, as amended, specify nine directors whereas, petitioner alleges, Intercast has only eight directors presently on its board.[2] Both the Broadcast Bureau and Intercast oppose the request. Intercast attaches to its opposition a letter from an attorney who is a member of the California Bar stating that under Section 301(d) of the California Corporation Code a corporation may lawfully operate as long as it has a minimum of three directors regardless of the number of directors specified in its articles of incorporation. Intercast asserts that it has more than three directors; therefore, it is legally qualified to do business as a California corporation.

3. The Review Board will deny the requested issue. It appears from Intercast's responsive pleading that it is legally qualified to do busi-

[1] The following related pleadings are also before the Board for consideration: (1) Broadcast Bureau's partial opposition, filed July 31, 1972; (2) Broadcast Bureau's errata to (1), filed August 1, 1972; (3) opposition, filed August 28, 1972, by Intercast; and (4) reply, filed September 7, 1972, by California Stereo.

[2] California Stereo alleges that Intercast amended its application on December 13, 1972, to show: an increase in the size of its Board of Directors from six to nine; the name of three new Board members; and, the deletion of one of its stockholders and directors as a "principal" of the applicant. With the deletion of one of its directors and failure to indicate whether he was replaced on the board, California Stereo argues that Intercast is short one director.

ness as a California corporation. California Stereo has not alleged any facts indicating that Intercast cannot operate as a legally qualified corporation in California with less than the number of directors specified in its Articles of Incorporation. Nor does it appear that Intercast has violated any of the corporation laws of the state. Under these circumstances the Board finds no basis for inquiry into Intercast's legal qualifications. *North American Broadcasting Co., Inc.*, 15 FCC 2d 261, 14 RR 2d 725 (1969). *Cf. North American Broadcasting Co., Inc.*, 15 FCC 2d 979, 15 RR 2d 311 (1969).

FINANCIAL ISSUES

4. California Stereo requests three separate issues involving alleged deficiencies in Intercast's financial proposal. In support of its first request, California Stereo alleges that seven out of eight of Intercast's principals submitted with the application balance sheets in which no distinction was drawn between current and long term liabilities; therefore, it cannot be determined whether these stockholder-principals can meet their remaining capital contribution commitment of $1,365.00 each. The failure of these principals to meet their commitments, according to California Stereo, will reduce Intercast's funds available by $9,555.00, thereby completely eliminating Intercast's cushion of $3,904.00, and leaving it $5,000 short of funds available. A second financial issue is warranted to explore the availability of a loan guarantee to Intercast, California Stereo asserts Intercast has indicated that it is relying on Kelly Broadcasting Company (Kelly) to guarantee a $10,000 loan; however, petitioner asserts, neither the original application nor subsequent amendments contain any written agreement by Kelly that it will guarantee the loan. Finally, a general financial issue is also warranted. California Stereo urges. In addition to an $80,000 loan and the $10,000 loan to be guaranteed by Kelly, Intercast has already borrowed $6,000 to meet costs of preparing and prosecuting its application, California Stereo maintains; however, it has not indicated in any amendment to its Estimate of Operating Expenses any payments for interest or repayment of the principal on the $6,000 loan.

5. The Review Board agrees with the Broadcast Bureau and Intercast that the requests should be denied. Intercast by an amendment to its application [3] has, in our view adequately answered the question raised by the petitioner. The balance sheets in the amendment to the application demonstrate that four out of eight Intercast principals have sufficient current liquid assets to meet their commitment. As to three of the four principals who do not have sufficient current liquid assets in excess of current liabilities, three other Intercast principals have agreed (by each submitting a letter included in Intercast's amendment to its application) to lend the three principals the amount of their commitment. As to the final principal, Dr. Kenneth Ponder, absent reliance on accounts receivable, he does not appear to have sufficient liquid assets to meet his commitment. However, in light of

[3] By Order, FCC 72M–1197, released September 22, 1972, Administrative Law Judge Lenore G. Ehrig granted Intercast's petition for leave to amend and accepted its amendment.

the fact that Dr. Ponder has total assets of almost $200,000 a net worth in excess of $83,000 and an annual income during the past two years of more than $35,000, we are satisfied that he will be able to meet his $1,525 commitment.[4] Intercast's amendment also resolves California Stereo's other two requests for financial issues. The amendment reveals that Kelly's guarantee is no longer required. The amendment also reveals that repayment of principal and interest on the already borrowed $6,000 is encompassed within the new bank loan agreement submitted with the amendment and Intercast has also increased its expense costs to cover the additional first year payment requirements on the loan.

CROSS-INTEREST ISSUE

6. In support of this request, California Stereo argues that Kelly's guarantee of a $10,000 loan to Intercast may violate the cross-interest policy derived from Commission Rule 73.240. This policy, petitioner maintains, prohibits a party from having a "meaningful relationship" with two or more stations of the same class serving the same market. Kelly, licensee of Stations KCRA, KCTC–FM and KCRA–TV, Sacramento, California, may not have a direct ownership interest in Intercast, California Stereo asserts; however, its guarantee of 10% of Intercast's funds to meet first year expenses places it in a position of possible control of the station. The Review Board will deny the requested issue. Intercast's amendment to its application deletes Kelly as a guarantor of the $10,000 prospective loan and California Stereo has not alleged any other facts suggesting that Kelly has any other interest in or connection with Intercast.

RULE 1.526 ISSUE

7. In support of this request petitioner alleges that Intercast published notice that its public inspection file would be available at the offices of Dr. Kenneth G. Ponder, Sacramento, California; that on June 25, 1972 at 10:15 a.m. Mr. Paul E. Anderson requested to see the file at Dr. Ponder's office and was unable to see it; and that on June 25, 1972, at 11:58 a.m., Marvin Clapp and Martha T. Thorne visited Dr. Ponder's office for the purpose of viewing the public inspection file and were also informed by the office receptionist that the file was unavailable. The above allegations demonstrate that Intercast was in violation of the Commission's Rule 1.526, California Stereo argues. The Broadcast Bureau supports the request.

8. In opposing the request, Intercast asserts the following facts: the public inspection file was locked in the desk drawer of Dr. Ponder who had the key and was away in surgery at the time the two visits were made; the doctor's office at the time the visits were made was very crowded and no space would have been available for inspecting the file; the receptionist, Mary Walker, requested the first visitor (Anderson) to return at a later time in order to permit her to check with Intercast's communications counsel to ascertain whether she could

[4] The amendment also reflects an increase in the amount from $1,365.00 to $1,525.00, that each principal will contribute and that four principals have agreed to loan the corporation an additional $2,500 each.

require him to identify himself; and none of the three returned at 1:30 p.m. when the receptionist had indicated the file would be available.

9. The Review Board will deny the request. Although it appears that Intercast technically violated Section 1.526 of the Rules by not making its public file available when requested, the Board is of the view that, in light of all the undisputed surrounding circumstances, the violation is not serious enough as to be decisionally significant or warrant a full evidentiary inquiry. In past cases where we have designated a Rule 1.526 or Rule 1.594 issue, petitioner had alleged that the public file was not readily available for public inspection [5] or was not located at the place indicated in the public notice,[6] and, thereby, was not fulfilling the public need for which the rule was created. Petitioner has not shown that the file would not have been available at 1:30 p.m. the same day the two visits were made when the receptionist told the callers to return. Nor did California Stereo demonstrate that the file was not located at Dr. Ponder's office. The Review Board notes, however, that it has reservations about locating public inspection files at such busy locations as doctors offices. The rule specifies that the file be located "at any accessible place". Intercast in essence concedes that the file may not have been available even if the receptionist had the key to the drawer (see paragraph 8, *supra*) because the crowded conditions of the office provided no space for viewing the file. Although we do not believe an issue is warranted, we admonish Intercast that its public inspection file should be readily available to the public.[7]

10. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed July 5, 1972, by California Stereo, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[5] See *Jacksonville Broadcasting Co.*, 26 FCC 2d 929, 20 RR 2d 626 (1970); *Marvin C. Hanz*, 22 FCC 2d 147, 18 RR 2d 830 (1970).

[6] See *North American Broadcasting Co., Inc.*, 15 FCC 2d 984, 15 RR 2d 367 (1969); and *Robert Cowan Wagner*, FCC 73R-3, —— FCC 2d ——, released January 5, 1973.

[7] California Stereo's argument that Ponder's receptionist was entitled to ask for the names and addresses of those requesting to see the public inspection file cannot be used as an excuse for not making the file readily available to a member of the public requesting to view the files. The Commission, in *WBRN Inc.* FCC 71-1267, 32 FCC 2d 729 (1971) stated that a licensee [or applicant] could ask a person requesting to see the public inspection file to identify himself; however, the Commission clearly implied that such requests should not be used to "harass, intimidate or otherwise discourage members of the public" from viewing its public inspection file.

F.C.C. 73R–36

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of CALIFORNIA STEREO, INC., SACRAMENTO, CALIF.	Docket No. 19515 File No. BPH–7668
INTERCAST, INC., SACRAMENTO, CALIF.	Docket No. 19516 File No. BPH–7669
EDWARD ROYCE STOLZ II, TRADING AS ROYCE INTERNATIONAL BROADCASTING, SACRAMENTO, CALIF.	Docket No. 19611 File No. BPH–7924
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted January 18, 1973; Released January 19, 1973)

BY THE REVIEW BOARD:

1. Before the Review Board is a second petition to enlarge issues, filed August 31, 1972, by Intercast, Inc. (Intercast) requesting addition of character qualifications, misrepresentation and Rule 1.514 issues against California Stereo, Inc. (California Stereo).[1]

2. Although filed after the June 23, 1972 expiration date for filing petitions to enlarge issues, Intercast argues that good cause exists for the late filing of its petition. According to petitioner the allegations of fact presented in its petition did not come to its attention until July 3, 1972, when California Stereo informed the Commission of the Keffury conviction (see paragraph 3, *infra*); also, no delay in the proceedings will result because the filing of a third application by Edward R. Stolz III prior to adoption of the designation Order has resulted in postponement of hearing dates until the Commission takes action on the Stolz application.[2] California Stereo, in opposing the requests on Rule 1.229 grounds, argues that, assuming the facts in question did not come to Intercast's attention until July 3, 1972, Intercast's petition is still untimely because it was not filed until August 31, 1972. The Review Board believes good cause has been shown for the late filing of Intercast's petition. Since California Stereo had not set forth detailed facts concerning the Keffury conviction in its July 3 letter to the Commission and since it indicated that it would file an amendment to its application to reflect the conviction, we find it was not unreasonable for Intercast to wait until more facts became available before filing its petition.

[1] Also before the Review Board are the following related pleadings: (a) Broadcast Bureau's comments, filed September 13, 1972; (b) opposition, filed September 13, 1972, by California Stereo, and (c) reply, filed September 26, 1972, by Intercast.

[2] Since the filing of Intercast's August 31 petition, the Commission by Order, FCC 72–916, released October 19, 1972, consolidated into this proceeding the application of Edward Royce Stolz, II, tr/as Royce International Broadcasting.

3. In support of its requests, petitioner alleges that William R. Keffury, a 33⅓% stockholder, director and vice president-secretary of California Stereo, was in 1963 arrested and charged with violating Sections 647(a) and 650½ of the California Penal Code;[3] that, on July 25, 1963, the charge as to Section 647(a) was dismissed, and Keffury pleaded guilty to a violation of Section 650½ and paid a fine of $144.38; that, in light of the statutes, the alleged misconduct may have involved moral turpitude; and that California Stereo did not report this conviction in its application, as required by Paragraph 10(d) of FCC Form 301.[4] Intercast argues that since the Commission has expressed concern over an applicant's or principal's involvement in unlawful practices (citing the *Report on Uniform Policy as to Violations by Applicants of Law of the United States*, 1 RR part 391: 495, 497 (1951)), a character qualifications issue is warranted. Although California Stereo informed the Commission by letter on July 3, 1972, of Keffury's conviction and proffered an amendment to reflect the conviction, petitioner notes that neither the letter nor the amendment details the circumstances surrounding the conviction. Section II, Paragraph 10(h) of FCC Form 301 requires a recitation of specific facts surrounding the conviction,[5] and, petitioner urges, failure to comply with the requirements of the Commission's application form suggests that California Stereo intentionally misrepresented facts concerning its legal and character qualifications. Finally, Intercast maintains that California Stereo's failure to report Keffury's 1963 conviction in its application violates Commission Rule 1.514, and an appropriate issue is therefore required.

4. Both the Broadcast Bureau and California Stereo oppose the requests. California Stereo submits with its opposition an affidavit [6] from Keffury detailing the events leading up to his arrest, the charges, the circumstances of the "trial" and the sentence, as well as steps now being taken to expunge his record.[7] Because of the circumstances surrounding the arrest, trial, and sentencing,[8] California Stereo asserts, Keffury did not realize at the time the application was filed, what the actual charges against him were, or what the conviction actually entailed; therefore, neither Keffury nor California Stereo can be charged with attempting to misrepresent any facts to the Commission.

5. The Review Board will deny petitioner's request for character qualifications, misrepresentation, and Rule 1.514 issues. In our opinion,

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[3] Section 650½ is entitled: "Injuring person or property; Act against public peace, health or decency; Misuse of another's name; False personation."

[4] Section II, Paragraph 10(d) asks, in pertinent part, "Has the applicant or any party to this application been found guilty by any court of (1) any felony, (2) any crime, not a felony, involving moral turpitude, . . ."

[5] Section II, Paragraph 10(h) states, "If the answer to any of the foregoing parts of this paragraph is 'yes', submit as Exhibit No. a full disclosure concerning the persons and matters involved, identifying the court and proceeding (by dates and file numbers), stating the facts upon which the proceeding was based or the nature of the offense committed, and the disposition of the matter."

[6] The affidavit was submitted with an amendment, filed July 20, 1972. By Order, FCC 72M-1196, released September 22, 1972, Administrative Law Judge Lenore Ehrig granted California Stereo's petition for leave to amend and accepted its amendment.

[7] Section 1203.4a of the California Penal code provides that if after one year from the date of pronouncement of judgment in a misdemeanor case the defendant has performed the sentence of the court and lived an honest and upright life, he may be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty. Keffury states that through his attorney, this relief is being sought.

[8] Keffury recites in his affidavit that he was arrested in the evening, taken to one jail and then transferred to another, was taken before a "very impatient" Judge, asked questions by the Judge without benefit of counsel, and then sentenced without really understanding the charges against him.

a character qualifications issue predicated on the conduct underlying the conviction is not warranted against either Keffury or California Stereo because: the incident occurred close to ten years ago; the offense was not of a serious nature, *i.e.*, Keffury was convicted of a misdemeanor and assessed a $150 fine; and no allegation was made that Keffury subsequent to his conviction has engaged in a similar offense or has committed any other illegal acts. California Stereo's amendment containing Keffury's affidavit adequately and fully sets forth the facts leading up to his arrest and conviction, and further exploration of the conviction, in our view, is unnecessary and could have no decisional significance in this proceeding. As indicated in the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965), hearings should not be converted into searches for an opponent's "minor blemishes, no matter how remote in the past or how insignificant." Nor do we believe that California Stereo's failure to bring this matter to the attention of the Commission in its application warrants inquiry under a Rule 1.514 or candor issue. California Stereo's letter of July 3, 1972, voluntarily informing the Commission of Keffury's conviction and the submission of its amendment do not suggest an attempt to conceal this matter. Keffury has explained in his affidavit that he failed to initially disclose the conviction through inadvertence and not having a substantial understanding of what the 1963 proceeding entailed. In light of all the circumstances surrounding the arrest and conviction, the Board finds no reason to doubt this explanation; and in view of the questionable significance and age of the conviction, we do not believe that the failure to report it reflects adversely on California Stereo's qualifications to be a licensee. In short, while Keffury's conviction should have been reported, we believe the omission to be *de minimis* and not of sufficient magnitude to require exploration through an evidentiary inquiry. *Cf. Payne of Virginia, Inc.*, 28 FCC 2d 66, 21 RR 2d 535 (1971).

6. Accordingly, IT IS ORDERED, That the second petition to enlarge issues, filed August 31, 1972, by Intercast, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-987

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CAPITAL CITY COMMUNICATIONS, INC. For Renewal of License of Radio Station WLUX, Baton Rouge, La.	Docket No. 19067 File No. BR-4266

MEMORANDUM OPINION AND ORDER

(Adopted November 8, 1972; Released November 14, 1972)

BY THE COMMISSION:

1. In our Memorandum Opinion and Order, 33 FCC 2d 703, released February 23, 1972, we denied the request of Erwin A. LaRose, Receiver of the bankrupt estate of Capital City Communications, Inc., licensee of Station WLUX at Baton Rouge, Louisiana, for a grant of the licensee's renewal application without hearing in conjunction with an assignment of the license to United Broadcast Industries, Inc. Since alleged wrongdoers would benefit substantially from a grant of the requested relief and no such significant equities in favor of innocent creditors had been shown to justify a grant without hearing where the licensee's character qualifications were at issue, we decided that action on the assignment application must await a determination in the hearing ordered on the renewal application. A petition for reconsideration of that order was denied. 34 FCC 2d 685, released May 1, 1972. Thereafter, in its decision on the merits, FCC 72-801, released September 20, 1972, the Commission found that the principals of Capital City do not possess the requisite character qualifications to continue as a Commission licensee [1] and concluded that a renewal of the station license would be inconsistent with the public interest. The renewal application was therefore denied.

2. Now before the Commission is a petition for reconsideration of our decision denying renewal filed by the Receiver in Bankruptcy of Capital City on October 3, 1972. The Receiver does not challenge our findings or conclusions or our ultimate determination concerning the character qualifications of the principals of Capital City. The only ground advanced for reconsideration is that the Receiver now has another offer to purchase the station for the sum of only $80,000 instead of the $250,000 offered by United. If an assignment to the second bidder is approved, the Receiver urges, no wrongdoer will be benefited since "no monies will be available to apply to the bank loans [for which certain stockholders or former stockholders of Capital City are

[1] In the absence of exceptional circumstances which justify special relief, the receiver or trustee in a bankruptcy proceeding stands in no better position, insofar as renewal of the license is concerned, than the broadcaster. See *Twelve Seventy, Inc.*, 1 FCC 2d 965, 967 (1965).

secondarily liable], and the wrongdoers will continue to be liable on these $51,000 in obligations."

3. The Broadcast Bureau opposes the petition.[2] Citing *Edwin R. Fischer* v. *Federal Communications Commission*, 135 U.S. App. D.C. 134, 417 F. 2d 551 (1969), the Bureau argues that the doctrine of administrative finality should be applied here and that the Receiver's petition should be denied. In *Fischer*, where an applicant had tendered an amendment to its proposal in connection with a petition for reconsideration of an adverse decision, the Court stated:

> The change in plan comes too late. Clearly the examiner's recommendation might well have stood if it had been supported at that time by such proposals. But we think an applicant should not be permitted to exhaust all means of achieving the greater urban coverage and then, only upon failure in that direction, to turn its attention to its declared rural or suburban aims and purposes. The Commission is not required to play games with applicants.

4. It would require a substantial showing of particularly meritorious public interest considerations to persuade us to adopt the Receiver's suggestion, which amounts to a request for approval of an inverse auction, i.e., an award to the lowest bidder. Not only has no such showing been made here, but we find that public interest considerations require a denial of the Receiver's petition. At some point, an administrative proceeding must be brought to a conclusion and we believe that point has been reached here. After thorough consideration of the numerous pleadings filed by the Receiver and the arguments advanced in support of his requests for approval of the renewal application and the assignment to United, we concluded that favorable action would be inconsistent with the public interest. Upon the filing by the Receiver of a waiver of hearing pursuant to Section 1.603 of the Rules and a statement asserting that extenuating circumstances justified a renewal of license, we made an exhaustive study of the merits of the application, and we concluded that the licensee had failed to sustain its burden of proving that renewal would serve the public interest, convenience, and necessity. Now the Receiver would have us commence the entire process anew for the purpose of considering a different proposal.

5. The suggestion is completely untenable and it must be rejected. Our denials of the Receiver's prior requests for special relief were not predicated on any dissatisfaction with United or with the amount of its bid but resulted from our determination that favorable action on the requests was inconsistent with the public interest. We likewise conclude that a grant of the extraordinary relief now requested by the Receiver would be contrary to the public interest and the request will be denied.

6. On October 27, 1972, the Receiver filed a request for oral argument so that he may respond to "any objections to the proposed assignment." As set forth herein, our denial of the Receiver's petition is not predicated on any objections to the particular assignment proposed, but on the absence of any significant public interest factors which warrant reconsideration of our decision denying the application for re-

[2] The opposition was filed on October 18, 1972. A reply to the opposition was filed by the Receiver on October 26, 1972.

newal of license. In view of the foregoing, oral argument would serve no useful purpose and the request will be denied.

7. Accordingly, IT IS ORDERED, That the Petition for Reconsideration and for Special Relief filed by Erwin A. LaRose, Receiver in Bankruptcy of Capital City Communications, Inc. on October 3, 1972, IS DENIED.

8. IT IS FURTHER ORDERED, That the request for oral argument filed by the Receiver on October 27, 1972, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1121

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Objections by
CARROLL COUNTY TRAILS ASSOCIATION, FINKSBURG, MD.
To Construction of Microwave Tower by
American Telephone & Telegraph Co.

DECEMBER 13, 1972.

Reference: American Telephone and Telegraph Co.; File No. 5843—C1—P—72, Finksburg, Md.

MR. RONALD A. MILHORN,
President, Carroll County Trails Association,
2 Morgan Court,
Finksburg, Md. 21048

DEAR MR. MILHORN: This is in response to your letter of May 9, 1972 (and a similar letter from Mr. Richard C. Schwartz) objecting, on behalf of the Carroll County Trails Association, to the construction of a 350 foot microwave tower as proposed by AT&T in the above referenced application.

You contend that the tower would be an eyesore in the middle of an area that is "supposedly primarily residential", adversely affecting the character of the area and the value of your homes. You also express concern that the microwave facilities would interfere with television and radio reception, constitute an "attractive nuisance" to children, and possibly cause radiation hazards. In response, AT&T makes the following comments: (a) in 1966 AT&T received zoning approval for the construction of underground facilities at this site after a public hearing during which the Planning and Zoning Commission was advised that a tower might be required in the future (although this latter point is disputed by you); (b) the construction of the underground building was generally well received in the community and AT&T permitted use of a portion of its access road to facilitate the subsequent development of the subdivision; and (c) in July, 1971 approval for the tower was received from the Planning and Zoning Commission after a public hearing (although your association may have been unaware of the hearing at the time).

The proposed Finksburg tower is adjacent to U.S. Route 140, a four-lane divided highway, in an area zoned business general, and located on a 19.76 acre tract which is adjacent to your development of about 80 completed homes. We do not anticipate that it will interfere with reception of radio or television signals in your community; nor do we believe that it would constitute any radiation hazard. [10 mW/cm^2 is the maximum permissible exposure level generally accepted in this

109-024—73——3

country.* Since these transmitters are low in power, this exposure level would not be approached even immediately in front of the antennas, much less at ground level.] As to being an "attractive nuisance", we understand that the tower will be appropriately fenced to protect children or others from any danger.

Accordingly, it appears that the only practical effect that the tower would have on the environment would concern the esthetic senses. While the tower would be in plain view of the majority of homes in your development, it would not likely be particularly visable by many other residents of the area due to trees and rolling terrain. We further note that there appear to be no public parks or significant historical sites in the area.

In considering the esthetic aspects of environmental matters we believe the Commission must, to a significant extent, evaluate the impact of the proposed construction in relation to national or widespread public interests, and not as a body for the appeal of local zoning decisions concerning only a very localized interest. Therefore, in consideration of this and the fact that no adverse effect on air, water or land is involved, we conclude that the proposed microwave station would not have a significant environmental impact.

Though the environmental impact of the project is not viewed as significant within the meaning of the National Environmental Policy Act, the Commission's staff nevertheless requested AT&T to prepare a detailed environmental report of the type specified by Section 1.1317 of the proposed rules (36 FCC 2d 108). In that report, which was filed on August 3, 1972, AT&T outlined four alternatives to the construction of the proposed tower at Finksburg ranging from the construction of a new L4 cable between Monrovia (near Frederick, Maryland) and Finksburg to three other microwave options. The cable option would require a 35 foot wide clearing over farmland, timberland and streams involving approximately 150 property owners and cost some $4.3 million. Each of the microwave alternatives would cost more than the estimated $1.7 million for the instant proposal and would require additional radio facilities over other paths which would involve the construction of more towers than now proposed, either currently or in the near future. In your letter of September 13, you recognize the potential problems caused by the erection of additional towers that would be necessitated under the other radio route options, and you urge the Commission to require AT&T to employ the cable option.

In addition to reviewing the various letters and reports filed, the Commission staff has visited the site and had lengthy discussions with AT&T concerning the need for these facilities and possible other alternatives. After evaluation of all information before us, we conclude that new transmission facilities are required to interconnect the Finksburg facility, which is a major junction for the Baltimore metropolitan area, during the conversion of the Boston-Miami coaxial cable from L3 to L5 operation (90,000 voice circuit capacity). Such facilities would also be used to handle the projected increase in long distance traffic into and out of the Baltimore area. AT&T contends that the

*This standard has been adopted by the Occupational Safety and Health Administration, Department of Labor (see 17 CFR 1910.97) and by the Departments of the Army, Navy, and Air Force.

deferral of service date beyond April 1, 1973 will cause an acute shortage of circuits on these routes. Of the alternatives for interconnecting Finksburg, it appears that the proposal before us is the most reasonable. The cable would prove much more costly and have substantially more environmental impact due to land clearing requirements. The other microwave radio alternatives would likewise be more expensive and actually increase the number of towers required.

In view of the foregoing, your objections are hereby denied and the referenced application is granted.

Commissioner Johnson dissenting and issuing a statement.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

Section 102(2)(c) of the National Environmental Policy Act (NEPA), 42 USC § 4332(2)(c), requires that prior to approving a major project which will have a significant impact upon the environment, this and other federal agencies must prepare a detailed statement on its environmental effects. Today the Federal Communications Commission reaches the rather startling conclusion that AT&T's proposed construction of a 350 foot microwave tower in the populated town of Finksburg, Maryland, will not have a significant impact upon the environment. As a result, the majority concludes that the project may be approved *without* the impact statement envisioned by § 102(2)(c) of NEPA.

In my opinion, the construction of a 350 foot tower in a residential area has the very "significant impact upon the quality of the human environment" which *does* demand that we at least prepare an environmental impact statement. I believe the Act requires that we consider the economic and environmental costs and benefits involved before deciding whether to approve this project.

In *Goosehollow Foothills League* v. *Romney*, 334 F. Supp. 877 (D. Ore. 1971) the court reversed the department of Housing and Urban Development's decision that the construction of a 16 story high-rise building in the city of Portland, Oregon, would not have a significant environmental impact. The court noted that the controversial nature of the proposed project, and the likelihood that the building would obscure the view for many citizens, were factors which indicated that the project's impact upon the *human* environment would be significant. *See also Hanly* v. *Mitchell*, 460 F. 2d 640 (2nd Cir. 1972), in which the Second Circuit explained that NEPA "must be construed to include protection of the quality of life for city residents." *Id.* at 647.

In the instant case, the majority has not considered whether, and to what extent, ATT's controversial tower will affect the quality of the human environment. Instead, the majority prefers to avoid what it terms "the long involved procedure of the detailed environmental impact statement." As a result, the majority reaches the curious conclusion that no microwave tower can ever have a significant environmental impact unless it is constructed in or near areas of special scenic, historic or recreational significance. I agree with my colleagues' assessment that such an interpretation might make this agency's work less difficult.

But such a conclusion runs contrary not only to the NEPA's direct commands, but also to the notion—which underlies the Act—that federal agencies must accept the burden of considering the environmental impact of their decisions. *See, generally,* Note, *Evolving Judicial Standards under NEPA*, 81 Yale L.J. 1592 (1972).

The majority relies also upon AT&T's "environmental report"—which AT&T prepared at our request—wherein AT&T concludes that its proposal is the least expensive and most efficient means of achieving the desired result. To the extent the majority relies upon this incredibly self-serving document as a basis for today's decision, that reliance is totally misplaced. *See Calvert Cliffs Coordinating Comm.* v. *AEC*, 449 F. 2d 1109 (D.C. Cir. 1971); *Goosehollow Foothills League* v. *Romney, supra.* Those cases make clear that the only institution which is qualified under the Act to decide whether an impact statement is necessary, is the agency "charged with overall responsibility for the proposed federal action." Although larger than all states, and most nation's of the world, AT&T has not yet been accorded the official status of a federal agency. I believe it is the FCC which must make the environmental impact study in this case. That it has failed to do. I dissent.

F.C.C. 73R–29

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
WILLIAM A. CHAPMAN AND GEORGE K. CHAPMAN, DOING BUSINESS AS CHAPMAN RADIO & TELEVISION CO., HOMEWOOD, ALA.	Docket No. 15461 File No. BPCT–3282
ALABAMA TELEVISION, INC., BIRMINGHAM, ALA.	Docket No. 16760 File No. BPCT–3706
BIRMINGHAM BROADCASTING CO., BIRMINGHAM, ALA.	Docket No. 16761 File No. BPCT–3707
For Construction Permit for New Television Broadcast Station	
BIRMINGHAM TELEVISION CORP. (WBMG), BIRMINGHAM, ALA.	Docket No. 16758 File No. BPCT–3663
For Modification of Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted January 15, 1973; Released January 17, 1973)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER CONCURRING IN THE RESULT.

1. Before the Review Board for consideration is a petition to enlarge issues, filed December 11, 1972, by Birmingham Broadcasting Company (BBC),[1] in which the petitioner seeks the addition of a cross-ownership issue against Birmingham Television Corporation (WBMG).[2]

2. In support of this request, BBC alleges that WBMG has an option to purchase 10% of a cable system franchise in a suburb of Birmingham, Alabama, and that Southern Broadcasting, the largest stockholder in WBMG, owns 25% of a cable system franchise in the Birmingham area. Although these ownership interests have been known to the petitioner for some time, BBC nevertheless contends that good cause exists for accepting its belated petition in light of the recent enactment of the cross-ownership rules, and the "press" of pleadings and other matters in the present proceeding. Both WBMG and the Broadcast Bureau oppose the addition of the requested issue. WBMG alleges that its option to purchase an interest in the Jefferson Cablevision Corporation was never exercised and that the option has expired, and that Southern Broadcasting Company sold and trans-

[1] Other related pleadings before the Board for consideration are: (a) opposition, filed December 19, 1972, by WBMG; and (b) Broadcast Bureau's opposition, filed December 27, 1972.

[2] Specifically, BBC requests the addition of the following issue:

To determine in light of the Commission's recently adopted rules—prohibiting cable system ownership and television station [ownership] in the same area [__] whether WBMG is qualified to receive a grant of Channel 21.

ferred its 55% interest in the Jefferson Cablevision Corporation on August 22, 1969.

3. The requested issue will be denied. Apart from the fact that petitioner has failed to show good cause why its untimely petition should be considered, the Board is of the view that the issue may not be predicated on either of the two alleged cable ownership interests. First, WBMG's option to purchase an interest in a CATV system has expired without being exercised. Second, a cross-ownership interest would be premature with respect to both cable interests (either actual or prospective), since the interests of WBMG and Southern Broadcasting in Jefferson Cablevision Corporation were both in existence prior to July 1, 1970. The provisions of Section 76.501 of the Commission's Rules [3] are not effective until August 10, 1973, as to proscribed ownership interests if such interests were in existence on or before July 1, 1970. See *Chapman Radio and Television Company*, FCC 72R–386, —— FCC 2d ——, —— RR 2d ——, released December 21, 1972.

4. ACCORDINGLY, IT IS ORDERED, That the petition to enlarge issues, filed December 11, 1972, by Birmingham Broadcasting Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[3] Section 76.501 of the Rules prohibits a cable television system from carrying the signal of *any* television broadcast station if such system directly or indirectly owns, operates, controls or has an interest in a television broadcast station whose Grade B contour overlaps the CATV service area.

F.C.C. 72-841

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
APPLICATION FOR EXEMPTION FROM THE PROVISIONS OF TITLE III, PART II, OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED, AND CHAPTER IV OF THE SAFETY OF LIFE AT SEA CONVENTION, LONDON, 1960, FILED ON BEHALF OF THE U.S. CARGO VESSEL "CYCLONE."

MEMORANDUM OPINION AND ORDER

(Adopted September 20, 1972; Released November 1, 1972)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission is in receipt of an application, File Number X-1088, filed by the Storm Drilling Company, 4141 Southwest Freeway, Houston, Texas 77027 on behalf of the United States cargo vessel CYCLONE, 5283 gross tons, official number 248959, requesting exemption from radiotelegraph provisions of Title III, Part II of the Communications Act of 1934, and Regulation 3, Chapter IV of the Safety of Life at Sea Convention, London, 1960.

2. The applicant requests exemption for a period of two years while the vessel is moored at drilling sites in the Atlantic Ocean off the coast of Brazil and for short periods not to exceed 24 hours when the CYCLONE is transiting between drilling sites within the authorized drilling area off the coast of Brazil. The authorized area comprises substantially the coast of Brazil between Santos and San Sebastian, never more than 150 nautical miles from the nearest land and initially at three locations approximately 24°16′ S, 46°15′ W; 25°16′ S, 46°15′ W; and 30°40′ S, 49°15′ W. The vessel is certified to carry a combination of 63 crew and oil workers and during drilling operations will carry a total of 24 persons on board.

3. Section 352(b)(2) of the Communications Act of 1934, as amended, authorizes the Commission to exempt cargo vessels from the compulsory radiotelegraph provisions of Title III, Part II of the Communications Act when the vessel is navigated not more than 150 nautical miles from the nearest land and it is found that to require a radio station is unreasonable or unnecessary. Regulation 5, Chapter IV of the Safety of Life at Sea Convention, London, 1960, authorizes the Commission to exempt cargo vessels on international voyages from the radiotelegraph provisions of Regulation 3, Chapter IV of the Safety Convention, if it considers that the route or other conditions affecting safety are such as to render full application of Regulation 3 unreasonable or unnecessary.

4. While operating in the above mentioned area, the applicant proposes to discontinue use of the radiotelegraph station equipment installed aboard the CYCLONE and to substitute the use of the radiotelephone installation on the basis that the latter facilities are adequate to insure the safety of the vessel and its crew. In support of this proposal, the applicant states as follows:

(a) The vessel's radiotelephone installation is adequate for any anticipated emergency and a continuous watch will be maintained on 2182 kHz.

(b) The coast station communications will be with "Petrobras" stations at temporary locations along the Brazilian coastline, and the Government of Brazil has authorized sharing of a "Petrobras" frequency. The CYCLONE will be able to communicate with at least one of these stations on a continuous basis. As the drilling location is changed, these stations will be relocated to maintain this capability. The intership and ship to shore communications will be conducted in both English and Portuguese.

(c) In addition, there are two support vessels, a work boat of 165 feet in length and a crew boat which will provide a substantial measure of safety to the CYCLONE and its crew. Both support vessels are equipped with radiotelephone stations and will maintain a continuous watch on 2182 kHz. One of these boats will always be at the CYCLONE during drilling operations, acting as a safety standby boat for evacuation of the CYCLONE's crew in case of an emergency.

(d) The CYCLONE, while moored at the drilling site, is indistinguishable from a non-self propelled drilling platform. During drilling operations the vessel will be moored with at least eight 30,000 pound anchors. In addition, the vessel will be attached to its well through a series of heavy pipe connections and will have, depending on the depth of the well, as much as 15,000 feet of five inch pipe in the well. Once a well has been started there is a great risk in abandoning the drill hole without extensive plugging procedures. There are times when it would be impossible to plug the hole and get the CYCLONE underway without exposure to hazardous conditions. Getting underway before drilling operations are completed requires a long period of time and involves substantial expense with possible loss of the well. Accordingly, it would be extremely impracticable, if not impossible, for the CYCLONE to leave its drilling location on short notice in order to render assistance.

5. A study of the international records available to the Commission indicate that there are no radiotelephone public coast stations operating in the vicinity of the drilling sites. There are, however, four coast stations privately owned by Petroleo Brasileiro ("Petrobras") which maintain a continuous watch on 2182 kHz. These stations will be capable of continuous communication with the CYCLONE and will be relocated, when necessary, as the vessel moves to other drilling sites. It appears that these four stations will provide a continuous communications capability between the CYCLONE and shore based facilities.

6. The CYCLONE when moored at a drilling location, engaged in drilling operations, is virtually immobile, and its ability to assist other radiotelegraph equipped vessels in distress is negligible. When operating in the authorized drilling area, the vessel will be in communications range of the "Petrobras" stations at all times. The radiotelephone equipment aboard the CYCLONE and its associated support vessels and the continuous availability of a standby vessel for emergency evacuation will supply the necessary measure of safety for the CYCLONE and its crew.

7. While the applicant has requested an exemption for two years, exemptions from the radiotelegraph provisions of the Safety Convention may only be granted for one year. It would be desirable to issue

the exemption from the Communications Act and Safety Convention to run concurrently.

8. In view of the foregoing, it would appear to be unreasonable to require the CYCLONE to comply with the radiotelegraph provisions of Title III, Part II of the Communications Act and Chapter IV of the Safety Convention while operating in the authorized drilling area.

9. Accordingly, IT IS ORDERED, That the United States cargo vessel CYCLONE, 5283 gross tons, official number 248959, be exempt from the radiotelegraph provisions of Title III, Part II of the Communications Act of 1934, as amended and Regulation 3, Chapter IV of the Safety of Life at Sea Convention, London, 1960, while moored at authorized drilling sites off the coast of Brazil between Santos and San Sebastian not more than 150 nautical miles from the nearest land and initially at three sites approximately 24°16′ S, 46°15′ W; 25°16′ S, 46°15′ W; and 30°40′ S, 49°15′ W, and for short periods of time not to exceed 24 hours while transiting between drilling sites in the authorized drilling area, for a period beginning the date of this order and continuing for a period of one year; PROVIDED, That:

(1) the vessel is equipped with a radiotelephone station and carries at least one radio operator as required by the Federal Communications Commission's Rules applicable to cargo vessels of 300 to 1600 gross tons subject to Title III, Part II of the Communications Act of 1934, as amended and Chapter IV of the Safety of Life at Sea Convention, London, 1969:

(2) a continuous watch is maintained on 2182 kHz;

(3) there is always a support vessel at the CYCLONE equipped with a radiotelephone station capable of operating in the 2–3 MHz frequency band, and that the support vessel maintains a continuous listening watch on 2182 kHz; and

(4) the vessel is always within communications range of a "Petrobras" coast station which maintains a continuous watch on 2182 kHz.

10. This exemption may be terminated by the Commission at any time, if, in the Commission's discretion, the need for such action arises.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1157

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
ELECTRONIC FUTURES, INC., NORTH HAVEN, CONN.
Failure to Conform Microphones to the Terms of FCC Type Approval

DECEMBER 20, 1972.

Mr. JAMES J. MCKEON,
President, Electronic Futures, Inc.,
57 Dodge Avenue,
North Haven, Conn. 06437

DEAR MR. MCKEON: This is with regard to the Electronic Futures, Inc. (EFI) Model 440 wireless microphone, which your company manufactures and markets under F.C.C. Type Approval No. WM-125 as part of a system for aiding people with impaired hearing. This letter directs you to refrain from further marketing of Model 440 microphones which do not conform to the terms of your F.C.C. type approval. It directs you also to modify non-conforming units that already are in use so that they will meet the standards of the type approval and of the Commission's Rules.

EFI obtained type approval for the microphone on February 16, 1971, in accordance with Parts 2 and 15 of the Commission's Rules and Regulations. The company later obtained a modification of the type approval to add an access hole leading to a potentiometer which controls the power output. Your letter of May 12, 1971, applying for approval of the modification, stated that the access hole in the case of the microphone would be "plugged with a split nylon rivet that will be heat sealed from the inside making removal virtually impossible." The Commission approved this change by letter dated June 4, 1971.

It was brought to the Commission's attention in the fall of 1972 that some EFI Model 440 microphones in use at schools in several parts of the country were operating in violation of Commission Rules and Regulations. The Commission subsequently obtained several microphones—from the field and from your factory in North Haven—and tested them at its laboratory in Laurel, Md. The tests revealed that the access holes leading to the potentiometer were plugged with removable plastic buttons which were not heat sealed, so that the power output could be adjusted beyond the maximum permitted under the rules (47 C.F.R. 15.212(d)).

Mr. J. O. Winters, president of Educational Development Corp. (sole owner of EFI), in a November 6 letter to F.C.C. Secretary Ben F. Waple, acknowledged the change in manner of plugging the access hole. He attributed the change to "difficulties at the manufacturing level in devising a practicable method for heat sealing the nylon

rivets from the inside . . ." Mr. Winters said that engineering personnel at EFI did not believe this to be the type of change in design that required advance approval; he said that the engineers believed they had taken reasonable measures to make the potentiometer control inaccessible to the user.

As you know, the purpose of the Commission's type approval procedure is to ensure in advance that devices will conform to technical standards under normal operating conditions. Wireless microphones in the 88–108 MHz band may not be operated without type approval (47 C.F.R. 15.212(f)); and devices for which type approval is required may not be marketed unless type approval has been obtained in advance (47 C.F.R. 2.803). The rules also forbid changes in type approved equipment without authorization by the Commission (47 C.F.R. 2.567(b), 15.237). Finally, a prerequisite for obtaining type approval of a wireless microphone is that the device be so constructed that the adjustment of any control accessible to the user shall not cause operation in violation of stated technical standards (47 C.F.R. 15.235(b)(3)).

The alteration EFI has made in its Model 440 microphone is particularly significant, in that it permits the user to increase the power output beyond allowable levels. Manufacture and sale of the device as altered apparently violate at least three specific regulations and a statute: Sections 2.567(b) and 15.237 of the Rules, alteration without prior approval; Section 2.803 of the Rules, marketing a device without prior type approval; and Section 302(b) of the Communications Act of 1934, as amended, [(47 U.S.C. 302(b)], manufacture and marketing of a device which does not comply with relevant regulations.

These violations occur, moreover, in the wake of protracted proceedings with regard to auditory training devices, during which the Commission reaffirmed its commitment to the rules governing operation in the 88–108 MHz band (F.C.C. Docket No. 19185). EFI and other members of the industry are well aware of the rules and of this renewed commitment, having participated actively in the rule making proceeding and having seen the Commission's response to violations by another firm. In this context, the Commission is justified in demanding strict adherence to its rules.

You are directed, therefore, to stop manufacturing, selling or leasing, offering for sale or lease, shipping and distributing units of the Model 440 microphone which do not conform to type approval documents relating to the device. You are directed also to modify Model 440 units already in use so as to make the potentiometer inaccessible to users. The potentiometers in new devices and in those directed to be modified must be set so as to produce no more than the radiated power allowable under Section 15.212 of the Rules. We expect you to respond to this letter with a statement of the steps you intend to take to carry out its substantive directives.

Commissioner Johnson concurring in the result.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
AMERICAN VEGETARIAN UNION, AKRON, OHIO
Concerning Fairness Doctrine Re Station WLWD–TV, Dayton, Ohio

DECEMBER 13, 1972.

HUGH MCNAMEE, ESQ.,
MS. NELLIE SHRIVER,
American Vegetarian Union,
1087 Madrid Drive,
Akron, Ohio 44313

DEAR MR. MCNAMEE AND MS. SHRIVER: This will refer to your complaint of June 7, 1972 on behalf of the American Vegetarian Union alleging that Television Station WLWD, Dayton, Ohio has failed to comply with the fairness doctrine with respect to certain dietary discussions presented on broadcasts of "The Phil Donahue Show". In particular, you state that in their appearances on "The Phil Donahue Show," Dr. Stillman and Adelle Davis "disparaged the vegetarian diet" while presenting and discussing their dietetic recommendations. You state that such disparagement was evidenced by Dr. Stillman's advocacy of an all-animal protein diet and his opinion that a vegetarian diet is fattening, and Ms. Davis' statements that vegetarians tend toward anemia, have a vitamin B12 deficiency, and must be careful to mix their protein in order to avoid malnutrition. You further state that the question of meat-eating versus vegetarian diets constitutes a controversial issue of public importance, citing numerous legislative bills, medical reports, scientific studies, and allegations of fact relating to meat production and consumption in support of such contention.[1] You also state that WLWD–TV's general manager informed you that the station has broadcast no "vegetarian viewpoint" nor does it intend to do so in the future. You have requested the Commission to review the station's decision not to afford opportunity for the presenta-

[1] Cited references and allegations include the following:
1. Bill pending in Congress to ban diethylstilbestrol, female hormone used in animal products, as carcinogenic and related to male sterilization and female vaginal cancer;
2. Bill pending in Congress to ban the use of DDT, which is allegedly present in greater quantities in meat than in vegetable protein;
3. Pending FDA ruling on antibiotics injected only into animal foods;
4. Humane Slaughter Bill pending before Congress;
5. JAMA report indicating that meat causes 97% of all coronary occlusions;
6. National Health Foundation report attributing incipient arthritis in children to meat;
7. Study by Dr. Andrew Weil indicating loss of weight and less strain on the heart as a concomitant of a vegetarian diet;
8. Factual allegation that 98% of all annual food poisoning fatalities are caused by meat;
9. Factual allegations that the Stillman diet causes premature kidney calcification and dysfunction, stomach wall lesions, and bleeding ulcers;
10. Factual allegations concerning ecological hazards of cattle feedlots and slaughter houses in Denver and Kansas City.

tion of a vegetarian response to Dr. Stillman's and Ms. Davis' comments and to direct the licensee to allow the American Vegetarian Union time to present its views.

In response to the Commission's inquiries, the licensee states that in its judgment "the question of vegetarian versus meat-eating diets was not a controversial issue of public importance at the time of the broadcasts." In supporting this conclusion, the licensee states: "There was no widespread debate in the community on this issue; it was not regarded as being of serious proportions by a substantial number of people, nor are the facts on their face so clear-cut as to raise the issue to the level of a controversy of public importance." The licensee also states that in their appearances on "The Phil Donahue Show" Dr. Stillman and Ms. Davis merely presented and discussed their respective dietary recommendations and did not criticize the vegetarian viewpoint. In this regard, the licensee submits that "The simple advocacy of these various diets does not constitute a disparagement of any other diet" and that the fairness doctrine is therefore inapplicable to the broadcasts in question.

The threshold question in this matter is the reasonableness of the licensee's judgment that the topic of meat-eating versus vegetarian diets did not constitute a controversial issue of public importance at the time of the broadcasts of which you complain. If such topic was not an issue of public importance and controversy, the fairness doctrine would not be applicable, and, therefore, any criticisms of vegetarianism expressed by Dr. Stillman and Ms. Davis would not obligate the licensee to afford an opportunity for the presentation of a contrasting vegetarian view.

Whether any topic is a controversial issue of public importance is initially determined by the licensee. As the Commission stated in the Fairness Primer, 29 Fed. Reg. 10416 (1964):

> The fairness doctrine deals with the broader question of affording reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance. Generally speaking, it does not apply with the precision of the "equal opportunities" requirement. Rather, the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming. See par. 9, Editorializing Report. In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. There is thus room for considerably more discretion on the part of the licensee under the fairness doctrine than under the "equal opportunities" requirement.

The licensee here believed that the question of meat-eating versus vegetarian diets did not constitute a controversial issue of public importance in its community, and after reviewing the matter it adheres to this determination. None of the material which you have furnished the Commission indicates that there is such public debate or controversy regarding meat-eating versus vegetarian diets as to create a controversial issue of public importance under the fairness doctrine. The pending FDA ruling and Congressional legislation concerning allegedly harmful chemicals employed in meat production may, in and of them-

selves, raise certain controversial issues; however, they do not establish that there is any substantial public concern or controversy regarding meat-eating versus vegetarianism per se. Similarly, although you cite the Humane Slaughter Bill pending in Congress and factual allegations concerning the ecological hazards of cattle feedlots and slaughter houses, it is not apparent that such references evidence a broader controversial public issue involving meat-eating versus vegetarian diets. Finally, while the medical reports, scientific studies, and factual allegations which you have submitted indicate that there is a considerable divergence of opinion among dieticians and nutritionists as to the effects of meat diets in general and of the Stillman diet in particular, such references do not in and of themselves indicate that there is a cognizable *public* controversy on these dietetic subjects. Absent such indication of public controversy, the Commission will not overturn the judgment of the licensee. The issue is not whether the Commission would have resolved this matter differently, but whether the licensee has been arbitrary or unreasonable in its judgment. Upon the facts here presented, it would not appear that the licensee has acted arbitrarily or unreasonably in determining that the broadcasts presented no controversial issue of public importance under the fairness doctrine.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief Complaints and Compliance Division,
For Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
DAVID I. CAPLAN, PH. D., NEW YORK, N.Y.
Concerning Fairness Doctrine Re Stations
WNBC–TV, WCBS, and WQXR

JANUARY 15, 1973.

DAVID I. CAPLAN, Ph. D.,
250 West 94th Street,
New York, N.Y. 10025

DEAR DR. CAPLAN: This letter will refer to your complaints against the following stations: WNBC–TV and Radio Stations WCBS and WQXR, all located in New York, New York.

In your July 11, 1972 complaint against WCBS, you allege that an editorial commentary, by Allen Jackson, presented only one side of a controversial issue of public importance. You state that the issue raised concerns the type of gun used in the attempt on Governor George Wallace's life. You assert that the editorial stated that the gun used by Arthur Bremer was a "cheap, Saturday night special"; that your information put the price of the gun "at the not so cheap figure of $80.00"; that the editorial "presentation has falsely immobilized public opinion behind the radio station's plea for more gun control laws"; and that by improperly identifying the gun, the station has confused the public on which handguns would be banned by legislation and therefore the fairness doctrine requires an opportunity for the presentation of contrasting views.

In a response to you, WCBS acknowledges its responsibilities under the fairness doctrine and states that "it is within the discretion of each licensee, acting in good faith, to choose appropriate methods of fulfilling its obligations"; and that "in view of its overall coverage of the gun control question" it felt that it had presented contrasting views. The station also enclosed copies of its "SPECTRUM" broadcasts to substantiate its claim of balanced overall programming on the gun control issue.

You replied to WCBS's response, again stating your belief that the classification of the weapon used by Arthur Bremer as a "cheap, Saturday night special" was incorrect; that a distinction needed to be made between "cheap, Saturday night special" and the type of gun used by Bremer because of two bills before Congress—one which would ban all short-barreled handguns, and the other which would ban only those handguns which failed to meet standards of quality and price; and that broadcast time was needed to present contrasting view to clarify the difference between the types of short-barreled handguns.

The station again responded to you stating that the above distinction was not of critical importance since the point of the editorial was to

inform the public of the Senate debate on the current and pending handgun legislation.

In your complaint of September 20, 1972 against WCBS, you state that on August 8, 1972, WCBS's news coverage of Senator Birch Bayh's proposed Handgun Control Act of 1972 made it appear that only "cheap" handguns would be banned from public sale whereas it was your understanding that all short-barreled and light-weight handguns were the subject of this legislation; and that WCBS is "guilty of broadcasting 'half-truths' about which handguns would be banned by Senator Bayh's bill."

In its October 3 response to you, WCBS stated that the news report referred to in the complaint consisted primarily of "excerpts from interviews" with Senator Edward Kennedy and Patrick Gray following the Senate's vote to ease record keeping with respect to certain ammunition; that "nowhere in the broadcast was any statement made that any pending gun control bill would ban only so-called 'Saturday Night Specials' when, as you contend, the bill would ban all lightweight handguns" and that the station "had covered the subject of gun control in a manner consistent with its obligations under the fairness doctrine."

In your complaint of April 25, 1972 against WNBC–TV, you state that on October 19, 1971 the station broadcast the program "GUNS AND THE LAW" which raised a controversial issue of public importance; that the particular issue raised was "whether or not a storekeeper in New York City can obtain a pistol license if he shows 'demonstrable need' "; and that the station has not afforded and does not plan to afford an opportunity for the presentation of contrasting views.

In a response to you, WNBC–TV stated that its policy was to present a fair balance of opinion on all controversial issues of public importance; that no individual organizations as such has a right to the use of a broadcaster's facilities under the fairness doctrine; and that the particular issue of obtaining a pistol license was not a controversial issue of public importance within the community. It further stated that the program "GUNS AND THE LAW" was broadcast to inform the public on the controversial issues surrounding gun control and was not presented to take sides on any potential controversy involving the ability of a storekeeper to obtain a pistol license.

It is noted that you and the station had additional correspondence concerning this issue; that although you persisted in your belief, that a public controversy existed on the subject of a storekeeper's ability to obtain a pistol license, the station refused to afford you an opportunity for the presentation of contrasting views, stating that "it was the station's judgment that no controversial issue of public importance existed in the community" on that subject.

In your October 16, 1972 complaint against WNBC–TV, you state that the August 7, 8 and 10, 1972 "TODAY" shows presented only one side of the controversy surrounding Senator Birch Bayh's Handgun Control Act; that on each of these dates, editorials and interviews made it appear that the only type of handguns which would be banned from public sale were "cheap, Saturday night specials", whereas it is your understanding that the Handgun Control Act would ban all handguns below a certain barrel size, regardless of price.

In a response to you, WNBC–TV stated that contrasting views had been presented on the gun control issue and cited FIRST TUESDAY'S "By Any Means Necessary," an indepth report on a Nebraska law concerning the right to bear arms and defend one's self against criminals, and an interview with Senator Roman L. Hruska (R. Neb.) on NBC NEWS WITH FLOYD KALBER concerning his proposal to exempt recognized gun dealers from the Senate bill banning the sale of handguns, as examples.

In your September 25, 1972 complaint against WQXR you state that on September 4, 1972, the station broadcast an interview with David E. Rosenbaum, which presented only one side of the question "whether or not there are any integration busing orders in effect in any Northern city of the United States" and has failed to afford a reasonable opportunity for the presentation of contrasting views.

In a response to you, WQXR stated that the pertinent dialogue in the interview was as follows:

> Jo DURSO. Are the court orders requiring a great deal more busing this year than last?
>
> Mr. ROSENBAUM. No, as a matter of fact, they're not. As far as I can tell there are only four communities in the country, and all of them are in the South or border states, that are actually busing.

The station stated that the above reply referred only to communities implementing new busing orders; that in the course of the interview reference was made to the Denver busing order coming up for review by the Supreme Court and to Detroit busing which was expected to be tested, that both of these Northern cities have integration busing orders in effect; that the interview was a balanced presentation; and that the interview did not raise an issue of "whether or not there are any integration orders in effect in any northern city."

The following general principles are applicable to all of your complaints.

The selection and presentation of specific program material are responsibilities of the station licensee, and under the provisions of Section 326 of the Communications Act the Commission is specifically prohibited from censoring broadcast material.

However, if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. This policy, known as the fairness doctrine, does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will

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review complaints to determine whether the licensee can be said to have acted reasonably and in good faith.

Where complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating: the basis for the claim that the station or network broadcast only one side of the issue or issues in its overall programming; and whether the station or network has afforded, or has expressed an intention to afford, reasonable opportunity for the presentation of contrasting viewpoints on that issue or issues. The Commission will, in appropriate cases, request a statement from the licensee or network and provide the complainant with an opportunity to comment on the licensee or network's statement if the complainant so desires. Thereafter, on the basis of all available information, the Commission will attempt to determine whether the licensee or network's actions under the circumstances violated any rules or policies of the Commission.

Although the Commission will not attempt to substitute its judgment of news values for those of a licensee, deliberate distortion, slanting or "staging" of news by licensees would be patently inconsistent with the public interest. However, in order for the Commission appropriately to commence action in this sensitive area it must receive significant extrinsic evidence of such deliberate distortion as, for example, statements by individuals who have personal knowledge that a licensee ordered the news to be deliberately distorted or fabricated. Were this Commission to do otherwise and proceed simply on the basis of allegations that what was said over the air was inaccurate or untrue, it would be in the position of determining the "truth" of each factual situation, evaluating the degree to which the matter complained of departed from the "truth," and, finally, calling upon the licensee to explain the deviation. The Commission believes that such activities would be inappropriate for a Government licensing agency. Rather than determining the truth or falsity of such statements, the Commission deems it more appropriate to assure that a reasonable opportunity is afforded for the presentation of contrasting views. *Letter to Mrs. J. R. Paul*, 26 F.C.C. 2d 591 (1969).

The Commission will take action only on fairness doctrine complaints which set forth specific information stating reasonable grounds for the complainant's conclusion that a licensee in its overall programming has not attempted to present opposing views on controversial issues of public importance. *Allen C. Phelps*, 21 F.C.C. 2d 12, 13 (1969).

The courts have made it clear that the fairness doctrine does not create a right in any particular person or group to be granted time, but that the fairness doctrine is issue oriented, and that it is sufficient for a licensee to show that it has presented the viewpoints advocated by a complaint. *Green* v. *F.C.C.*, —— U.S. App. D.C. ——, 447 F. 2d 323, 328 (1971). Moreover, the Commission and the courts "have stressed the wide degree of discretion available under the fairness doctrine and that the key to the doctrine is . . . the exercise of reasonable standards by the licensee." *Democratic National Committee et al.* v. *F.C.C.*, —— U.S. App. D.C. ——, 461 F. 2d 891 (1972).

The issue with which your complaints against WCBS and WNBC are concerned is gun control. Each of the stations indicated in its re-

plies that it had presented contrasting views on gun control in its overall programming and that the issues raised in your specific complaints were not controversial issues of public importance, but merely statements made in discussing a controversial issue. As the Commission stated in *In re Petition of NBC*, 25 FCC 2d 735 (1971), the fairness doctrine requires reasonable opportunity for the discussion of conflicting viewpoints on issues of public importance, but this does not mean that balance may "be required as to every statement or assertion made in discussing a controversial issue". Clearly, the licensee must be given considerable leeway for exercising reasonable judgment as to what statements or shades of opinion do require offsetting presentation. If every statement, or inference from statements or presentations, could be made the subject of a separate and distinct fairness requirement, the doctrine would be unworkable. . . . A policy of requiring fairness, statement by statement or inference by inference, with constant Governmental intervention to try to implement the policy, would simply be inconsistent with the profound national commitment to the principal that debate on public issues should be "uninhibited, robust, wide-open".

In regard to your complaints against WCBS you allege that the station has used the term "cheap, Saturday night special" to mobilize public opinion behind gun control and that contrasting views are necessary to distinguish between the various types of handguns. As stated above in *Green* v. *F.C.C.*, *supra*, the Court held that the thrust of the fairness doctrine is issue oriented and that the station fulfills its obligation by showing it has presented contrasting viewpoints in its overall programming. We agree with WCBS that the programs which it broadcast dealt with gun control legislation; that any controversy over the types of guns which are the subject of proposed legislation is only part and parcel to the real issue of gun control; and that the issues raised in your complaints were not separable issues of public importance which demand a reasonable opportunity to present contrasting views. Your complaints against WNBC–TV deal with the same gun control issues discussed above. In each complaint you take issue with certain comments or inferences made during the broadcasts. The Commission has made it clear that the licensee must be given considerable leeway for exercising reasonable judgment as to what statements warrant offsetting opinion. As stated above, the fairness doctrine does not require balance as to every statement or assertion made in discussing a controversial issue. It is the licensee who must make this initial determination and the Commission's position is to review only the reasonableness of the licensee's judgment.

In your complaint against WQXR, you allege that in a station interview David E. Rosenbaum made certain comments which involved the busing controversy and that the fairness doctrine required an opportunity to present contrasting views. Again, *In re Petition of NBC*, *supra*, is applicable and the licensee cannot be expected to balance every statement made during the discussion of a controversial issue. The station contends that it has presented contrasting views on the busing issue in its overall programming and you have furnished no information to the contrary.

Accordingly, it does not appear on the basis of information presently before the Commission that WNBC, WCBS or WQXR have failed on an overall basis to afford reasonable opportunities for the presentation of contrasting views regarding the matters raised in your letters.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division,
For Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
DAVID B. FERRIS, KAUFMAN, TEX.
Concerning Fairness Doctrine Re Station
WACO

DECEMBER 14, 1972.

Mr. DAVID B. FERRIS,
301 West Chestnut Street, Apartment B,
Kaufman, Tex. 75142

DEAR MR. FERRIS: This is in reply to your complaint against Radio Station WACO, Waco, Texas, in which you allege that WACO violated the fairness doctrine by broadcasting programs which advocate support of the United States involvement in the Vietnam conflict and has failed to provide a reasonable opportunity for the presentation of contrasting views on this controversial issue of public importance.

You state that you believe that the United States immediately should end its involvement in the Vietnam War; that WACO broadcast George Putnam's five minute program "One Reporters Opinion" twice daily, Monday through Friday and H. L. Hunt's 15 minute program "Life Line" daily; that both of these programs advocate continuous and increased United States military involvement in the Vietnam War and an acceleration of the arms race; that you have not heard any pacifist or anti-war programs aired on the station; and that there is no indication that the station plans to present such views. You further state that you have requested the station to broadcast the "Unsell the War" series of spot announcements which present the anti-war side of the Vietnam conflict, but that your request was denied.

In reply to your complaint, the licensee states that it believes the war in southeast Asia is a controversial issue of public importance; that it has presented various aspects of opinion on the issue in programs which it has broadcast in the past and is continuing to broadcast; that it carries ABC's "Contemporary News" which, in general, covers the peace movement, antiwar activities, and the movement to bring American troops home; that the station's "Public Forum," which is broadcast daily, invites and receives discussion on the pros and cons of the war; and that the station carries the program "Perspective," a 25 minute documentary from the American Information Network, which often includes commentaries by experienced correspondents on various issues surrounding our involvement in Vietnam. WACO contends it is reluctant to broadcast the "Unsell the War" series because it believes spot announcements fail to illuminate the issues properly. Moreover, states WACO, at the station's invitation you and your colleagues were sched-

uled to appear on the "Public Forum" program on May 29, 1972 to discuss your views concerning the war.

In response to the reply of WACO, you acknowledge that you appeared on the station to discuss your views concerning the Vietnam War, but state that you are "not sure that the occasional airing of pacifist views by two average citizens to balance the almost daily presentation of pro-war views by a professional . . . would be ruled 'fair' by the Federal Communications Commission."

The fairness doctrine provides that if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. The fairness doctrine does not require "equal time" be afforded each side but does require the licensee to present contrasting views in its overall programming which, of course, includes statements or actions reported on the news. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith.

The Commission and the courts have made it clear that the "fairness doctrine is issue oriented and the licensee is not obligated to have any particular advocate appear on the station if such advocate's point of view has been or is being presented on the station by others." *Green* v. *F.C.C.*, 447 F2d 323, 328 (1971). Moreover, a person or group cannot demand that as a matter of right its message be presented over the station's facilities. The licensee does not have to present programming material which he believes either will not serve the needs or interests of his listeners or will not do so as well as other programming material. *Letter to Richard Ottinger*, 31 F.C.C. 2d 853. Also, the Commission and the courts "have stressed the wide degree of discretion available under the fairness doctrine and that the key to the doctrine is . . . the exercise of reasonable standards by the licensee." *Democratic National Committee et al.* v. *F.C.C.*, 460 F2d 891 (1972).

The question raised by your complaint is whether the station has complied with the fairness doctrine in its overall programming on the issues herein. It is noted that you appeared on the "Public Forum" show in April of 1972 and have been extended a standing invitation to select another date to discuss other issues surrounding the war in Vietnam; and that the station is planning to continue its regular programs which include ABC's "Contemporary News," its own "Public Forum," and the "Perspective" program. In view of the foregoing, and considering that the licensee has indicated that it will continue to present programming of contrasting views on the issues, it does not appear that the station has failed to comply with the requirements of the fairness doctrine or that any Commission action is warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C., 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division,
For Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
JAMES A. McCANN, COMPTROLLER, CITY OF MILWAUKEE, MILWAUKEE, WIS.
Concerning Fairness Doctrine Re Station WTMJ–AM–FM–TV

DECEMBER 14, 1972.

Mr. JAMES A. McCANN,
Comptroller, City of Milwaukee,
Room 401, City Hall,
Milwaukee, Wis.

DEAR MR. McCANN: This is in reply to your complaint of May 12, 1972 against station WTMJ–AM–FM–TV. You state that on April 27 and 28, the station broadcast an editorial which "contained basic errors of fact, and in addition, was highly detrimental to my reputation as a public official"; that the editorial contained "biased and incorrect information"; that you asked the station for an opportunity to reply; that the station first granted and then refused your request; and that you believe you are entitled to comment on the station's editorial.

You enclosed a copy of a letter dated May 9, 1972 from the station to you in which it stated that it was "renewing the invitation 'made' during our recent telephone conversation to broadcast a statement from you on WTMJ–FM radio"; that your "recorded explanations" were used on the AM and TV news programs on May 1, 1972; and that "these portions, disputing the statement that you had asked for a raise, were much greater in length of time on the air than the editorial Comment."

In response, in your letter of May 12, 1972 you stated that you were not satisfied with the station's response; that you "wanted to comment for one minute or less on the 'Comment Editorial' "; and that the news coverage to which the station refers was one minute in length and "did not highlite the points I would have chosen."

The selection and presentation of specific program material are responsibilities of the station licensee, and under the provisions of Section 326 of the Communications Act the Commission is specifically prohibited from censoring broadcast material.

However, if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. This policy, known as the fairness doctrine, does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of con-

trasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith. For your further information, we are enclosing a copy of the Commission's Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance."

With respect to your allegations that the station distorted news regarding the matters about which you are concerned, the Commission will not attempt to substitute its judgment of news values for those of a licensee. Of course, deliberate distortion, slanting or "staging" of news by licensees would be patently inconsistent with the public interest. However, in order for the Commission appropriately to commence action in this sensitive area it must receive significant extrinsic evidence of such deliberate distortion as, for example, statements by individuals who have personal knowledge that a licensee ordered the news to be deliberately distorted or fabricated. Were this Commission to do otherwise and proceed simply on the basis of allegations that what was said over the air was inaccurate or untrue, it would be in the position of determining the "truth" of each factual situation, evaluating the degree to which the matter complained of departed from the "truth," and, finally, calling upon the licensee to explain the deviation. The Commission believes that such activities would be inappropriate for a Government licensing agency. Rather than determining the truth or falsity of such statements, the Commission deems it more appropriate to assure that a reasonable opportunity is afforded for the presentation of contrasting views. However, as stated above, when significant extrinsic evidence of deliberate distortion or staging of news is received, the Commission will make such inquiry as appears appropriate to the circumstances. The integrity of news broadcasting is crucial to an informed, responsible electorate and the Commission has stressed the continuing duty of licensees to take adequate measures to insure such integrity. *Letter to Mrs. J. R. Paul*, 26 F.C.C. 2d 591 (1969).

As you can see by the foregoing, no individual is entitled to appear on any specific program, and the Commission will not review the truth or falsity of news programming in absence of extrinsic evidence. From the information you have furnished, it does not appear that the licensee can be found to have been unreasonable in its judgment with respect to its fairness obligations. Your recorded statements were broadcast on WTMJ AM and TV and the station had offered to broadcast a statement by you on WTMJ–FM. Although you state that the AM and TV broadcasts of your statements "did not high-lite the points [you] would have chosen," you do not indicate how the licensee

has failed to comply with the fairness doctrine in its overall programming. Under these circumstances it appears that no further action by the Commission is warranted.

The delay in responding to your complaint because of the heavy workload of the Commission is sincerely regretted.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY.
Chief, Complaints and Compliance Division.
For Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
QUECHEE LAKES CORP., BOSTON, MASS.
Concerning Fairness Doctrine Re Station
WNAC–TV

JANUARY 5, 1973.

QUECHEE LAKES CORP.,
c/o Sullivan and Worchester,
225 Franklin Street,
Boston, Mass. 02110

GENTLEMEN: This is in reference to your complaint against Station WNAC–TV, Boston, Massachusetts. You allege that the licensee made an attack upon the honesty, character, and integrity of Quechee Lakes Corporation and its personnel; that the alleged personal attack occurred during the presentation of five program segments concerning land developments in the New England area which were broadcast sequentially on November 15, 1971 through November 19, 1971, and again on November 22 through November 26, 1971; that each segment was approximately five minutes long and was presented within the WNAC–TV news broadcasts; that the November 15 through 19 segments were broadcast twice on each day and the November 22 through 26 segments were broadcast once each day; and that in the first segment of the series innuendo and insinuation were used to suggest that Quechee Lakes Corporation was dishonest.

You state that the technique used by WNAC–TV in the first segment was to "generalize a warning about the deceitful practices of *some* land developers and then to concentrate only on Quechee, orally and visually, as a typical development; that the impression created, intentional or otherwise, was that Quechee, being typical, is one of the deceitful developers"; that the succeeding segments did not undo the damage of the alleged personal attack; and that an opportunity to respond to the alleged personal attack was denied by the licensee. You request that the Commission take appropriate action in regard to fairness obligations of WNAC–TV.

In response to a Commission inquiry, the licensee stated that it had fulfilled its fairness doctrine obligations in regard to the issue of the effect of land developments on the environment because it had presented contrasting views on the issue and had allowed the land developers a fair opportunity to respond to criticisms against their business practices. According to the licensee, any complaints or criticisms against Quechee Lakes Corporation were refuted by a representative of Quechee Lakes or by others. The licensee states that Mr. Davidson, Chairman of Quechee Lakes Corporation, was interviewed on November 3 and November 9 and was questioned as to specific

complaints and given a fair opportunity to present the significant contrasting viewpoints of his corporation (these interviews appeared on the feature series); that the criticisms of Quechee Lakes Corporation and its development project were balanced by the praise it received; that the personal attack rules are inapplicable because the features were part of bona fide newscasts and involved bona fide news interviews which are exempt from personal attack rules; and that the alleged "attacks" were merely criticisms of the judgment or actions of the complainant and did not constitute "personal" attacks.[1]

In another case where broadcast of a personal attack within a news program was alleged, the Commission stated, "We need not resolve the question of the applicability of the personal attack rule . . . For, however the rule is construed, the crucial issue . . . is whether the licensee met his clear responsibility to be fair. Indeed, in our reports on the areas exempted from the personal attack rules, we stressed the necessity in any event to achieve fairness or to notify the person attacked and afford him the opportunity to give his side. See paragraph 5, 33 Fed. Reg. 5363." *M. Goldseker Real Estate Co.*, 32 F.C.C. 2d 28, at 29 (1971); aff'd —— U.S. App. D.C. ——, —— F. 2d —— (1972).

The fairness doctrine requires that when a station presents one side of a controversial issue of public importance, it must afford a reasonable opportunity for the presentation of contrasting views. The licensee has an affirmative duty to encourage and implement the broadcasting of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Both sides need not be presented in a single broadcast or series of broadcasts and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of an individual to broadcast his views. It is the responsibility of the licensee to determine whether a controversial issue of public importance has been presented, and, if so, how best to present contrasting views on the issue. The Commission will review complaints only to determine whether the licensee can be said to have acted reasonably and in good faith.

From the information before the Commission, it appears that in the first segment of the series, a statement was made by a purchaser of land in the Quechee Lakes project that potential buyers were not told about a polluted river; that immediately thereafter Mr. John Davidson, Board Chairman of Quechee Lakes Corporation, stated

[1] 47 C.F.R. 73.123(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraphs (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in a campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraphs (a) of this section shall be applicable to editorials of the licensee).

that the Corporation has donated large sums of money to clear up the river and that the development project will save the area from decaying; that Mr. Davidson also appeared on other segments and presented the positive side of the Quechee Lakes Project; and that the announcer for WNAC–TV stated that "Quechee is still among the best organized and best financed of the New England developments and has won praise from the Vermont State House for its efforts." Thus, while it is true that criticism was voiced against the Quechee project and other similar projects, it does not appear on the basis of the facts before the Commission that the licensee failed to present contrasting viewpoints on the controversial issues raised in the program. Also, Mr. Davidson himself had an opportunity to present the views of the Quechee Lakes Corporation, and the licensee's actions appear to have been reasonable. Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division,
For Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
GEORGE G. TRAFTON, JR., VAN NUYS, CALIF.
Concerning Fairness Doctrine Re Station
KHJ–TV, Los Angeles, Calif.

JANUARY 4, 1973.

MR. GEORGE G. TRAFTON, JR.,
13418 Vanowen Street, Apartment No. 1,
Van Nuys, Calif. 91405

DEAR MR. TRAFTON: This letter will refer to your complaint against KHJ–TV (Channel 9), Los Angeles, California. You state that on February 16, 1972 and June 19, 1972 the station's TEMPO program dealt with the anti-hunting side of the controversy surrounding wildlife conservation, and has failed to afford a reasonable opportunity for the presentation of contrasting views. More specifically, you state that Cleveland Amory, spokesman for "Funds for Animals", was the person interviewed on both of the above occasions and that each of his appearances resulted in a "gross distortion of the truth, liberally laced with misconceptions and misstatements" about sports-hunters and their role in wildlife conservation.

In reply to your complaint station KHJ–TV states that TEMPO is a public affairs program devoted to the discussion of matters of public interest; that it presented interviews with anti-hunting proponents like Cleveland Amory; that it has broadcast contrasting views through interviews of such individuals as the Director of the California Fish and Game Commission and the editors of "Gun" and "Arms" magazines, who favor hunting and believe that it is an indirect means of conservation. In addition, the station states that some of the issues raised by Mr. Amory, such as the killing of baby seals in Canada and open season on coyotes, are not controversial issues of public importance to the communities the station serves; and that contrasting views were given on issues which were considered important to the communities served, such as the killing of ocean mammals and the killing of seals in Alaska. The station concludes by stating its belief that it has "consistently and fairly presented contrasting viewpoints" on points raised by the complaint.

In response to KHJ–TV's reply you state that the station has failed to make the proper distinction between sports-hunters and commercial hunters; that sports-hunters have been unnecessarily attacked by Cleveland Amory's appearances on the TEMPO program and the station should make time available for contrasting views.

The fairness doctrine provides that if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. The fairness doctrine does not require "equal time" be afforded each side but does require the licensee to present contrasting views in its

overall programming which, of course, includes statements or actions reported on the news. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith.

Although the interview with Mr. Amory was apparently anti-hunting in content, the station states it has afforded reasonable opportunities for the presentation of contrasting views. For example, on the April 27, 1972, "Tempo" program, Thomas J. Saitos and George Martin, Publisher and Editor of "Gun" and "Ammo," respectively, appeared to discuss their opposition to unduly restrictive gun control laws; on the April 27, 1972, "Tempo" program, G. Roy Arnett, Director of the California Fish and Game Commission, appeared and discussed how sports-hunters contribute to wildlife conservation and on September 19, 1972, Lawrence P. Reisch and Lee Prather appeared to discuss National Hunting and Fishing Day and commented on attempts to educate the public about conservation efforts of persons interested in hunting and fishing and also on the fact that endangered species are not being destroyed by legitimate sportsmen and hunters but by poachers and those who kill for trophies. Under these circumstances, the public has not been left uninformed on the issue, and you have not shown that KHJ has failed on an overall basis to afford reasonable opportunities for the presentation of contrasting views. A licensee has considerable discretion as to the format devoted to issues of public importance, including selection of the spokesman for each point of view.

With respect to the accuracy of program material or allegations that a network, station or newscaster has distorted news or has staged or fabricated news occurrences, the Commission's policy in this area is set forth in its Letter to *Mrs. J. R. Paul*, 26 F.C.C. 2d 591 (1969), a copy of which is enclosed. As you will note, the Commission believes that it, as the governmental licensing agency, should not attempt to determine the "truth" of a given situation and whether a news report has given the "truth." Rather, it will take action in such cases only when it has substantial extrinsic evidence that the licensee has deliberately distorted its news reports or staged news events.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

ARTHUR L. GINSBURG,
Acting Chief, Complaints and Compliance Division,
For Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
MRS. H. B. VAN VELZER, TYRON, N.C.
Concerning Fairness Doctrine Re Station
WSPA–TV, Spartanburg, S.C.

JANUARY 15, 1973.

MRS. H. B. VAN VELZER,
Route 1, Box 93,
Tyron, N.C. 28782

DEAR MRS. VAN VELZER: This is in reference to your letters of complaint, dated August 22, and November 15, 1971, alleging that Station WSPA–TV, Spartanburg, South Carolina, has failed to comply with the fairness doctrine in respect to certain of its programming. In particular, you state that in broadcasting THE NEW SCIENCE Summer Semester Series and the MONKEYS, APES, AND MAN National Geographic Series, WSPA–TV has presented views supportive of the Darwinian theory of evolution, and that the station has not afforded, nor does it intend to afford, opportunity for the presentation of contrasting views which reject that theory in favor of the Biblical interpretation of Creation. You further allege that the theory of evolution is a controversial issue of public importance in WSPA–TV's local service area, and that the fairness doctrine therefore obligates the station to afford time for the presentation and discussion of views opposed to those expressed in the programs in question.

In response to a Commission inquiry, the licensee of WSPA–TV, Spartan Radiocasting Company, states that "In the judgment of WSPA–TV this programming did not present a viewpoint on a controversial issue of public importance." It further states:

> . . . any dispute that may exist as to the theory of evolution fails to rise to sufficient public importance to invoke the fairness doctrine in the area served by WSPA–TV. . . . the station's conclusion is based on its diligent ascertainment of its service area, including formal community leader interviews and surveys of the general public. Thus, in the station's special, pre-renewal ascertainment efforts in which it is now engaged it has not encountered a single person who has identified the theory of evolution as being an important public issue.

In reply to the licensee's response, you dispute the reasonableness of its judgment that the theory of evolution does not present an issue of sufficient public importance to render the fairness doctrine applicable to the programming in question. In particular, you submit that as the station has indicated that the series has been "highly acclaimed" and has been broadcast three times a week for a five-month period, it is inconsistent for it to contend that the subject of evolution is not one of public importance. You also submit that the station survey which the

licensee cites in support of its conclusion must have ignored the fundamentalist views and beliefs of a sizable segment of the population in its service area, including the students and faculty of fundamentalist colleges and the membership of many fundamentalist churches. In support of these assertions, you have submitted copies of eleven letters to the editor of the *Greenville* (S.C.) *News* in response to an initial letter which you wrote to the paper expressing your view that the theory of evolution is a current controversial issue of public importance in your area.

The question presented by your complaint and the licensee's response is the reasonableness of WSPA–TV's judgment that the theory of evolution does not constitute a controversial issue of public importance in its local service area within the meaning and purview of the fairness doctrine. As has been frequently observed, "(to) invoke the fairness doctrine . . . there must exist a controversial issue of public importance on which the licensee has refused to allow a reasonable balanced point of view." *Green* v. *F.C.C.*, 447 F. 2d 323, 327 (D.C. Cir. 1971); *quoted with approval in Healey* v. *F.C.C.*, —— U.S. App. D.C. —— (March 3, 1972). The Commission has long held in this regard that it is both the responsibility and within the discretion of the broadcast licensee to determine whether a controversial issue of public importance has been presented in its programming, and that in passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. Thus, the burden is on the complainant to establish that the licensee's judgment in such matters is unreasonable, arbitrary or lacking in good faith. See *In re Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598 (1964); *Report of Editorializing*, 13 F.C.C. 1246 (1949).

The licensee here does not believe that the Darwinian theory of evolution constitutes a controversial issue of public importance in its service area, and after reviewing the matter it adheres to this determination. Review of the allegations and material which you have submitted fails to disclose any substantial evidence that this judgment of the licensee is unreasonable, arbitrary or otherwise lacking in good faith. Merely because a particular subject is considered of informational or educational value and interest to the viewing public and is therefore presented in the licensee's programming does not necessarily indicate that such subject constitutes a controversial issue of public importance within the meaning of the fairness doctrine. See *Healy* v. *F.C.C.*, *supra; Letter to Dr. David S. Tillson*, FCC 70–49 (January 8, 1970). Although the letters to the editor of the *Greenville News* in response to your initial letter concerning this matter would appear to indicate that there are differing private views on the theory of evolution among certain members of your community, such letters and views do not in and of themselves evidence a substantial public controversy regarding that subject within the purview of the fairness doctrine.[1]

[1] While one letter writer stated his opinion that evolution is "a controversial issue", four of the remaining ten writers expressed views indicating they did not see it as such and the other six merely stated their own private views on the subject without expressing any opinion as to whether or not they considered evolution to be a controversial issue of public importance or magnitude.

None of the material which you have furnished the Commission indicates that at the time of the broadcast of the programs in question, the theory of evolution was the subject of any legislative bill or debate, or other public action or inquiry such as would demonstrate that evolution was a controversial issue of public importance. Absent any substantial evidence of public controversy and importance, the licensee's judgment in this matter stands uncontradicted and may not be overturned. This is not to say that the particular religious views which you and others in your community hold are inconsequential or lightly dismissed. However, the issue here is not the general significance of such private views, but the reasonableness of the licensee's determination that no controversial issue of public proportion inheres in the theory of evolution as presented in its programming. Upon the facts which you have presented, it does not appear that this judgment of the licensee is either contrary to its responsibilities or an unreasonable exercise of its discretion.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division,
For Chief, Broadcast Bureau.

F.C.C. 73-41

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (RENO/SPARKS, NEV.)	RM-1882

MEMORANDUM OPINION AND ORDER

(Adopted January 10, 1973; Released January 17, 1973)

BY THE COMMISSION: COMMISSIONER HOOKS ABSENT.

1. On November 24, 1971, Mr. Philip D. Doersam, Pendor Communications, licensee of KGLR(FM), Reno, Nevada; Mr. Ray H. Koon, Western Inspirational Broadcasters, Inc., licensee of KNIS (FM), Carson City, Nevada; Mr. Carl E. Roliff, RAESCO, Inc., licensee of KSRN(FM) Reno, Nevada; and Mr. Donald W. Hollister, Kelly Broadcasting Co., licensee of KPTL, Carson City, Nevada [1] filed a joint petition with this Commission requesting the deletion of FM Channel 295 from Reno, Nevada, and 252A from Sparks, Nevada. Oppositions to the petition were filed by B.B.C., Inc. (an applicant for FM Channel 295 at Reno) and Mr. Everett B. Cobb, licensee of KNEV(FM), Reno, Nevada. Individual responses to the oppositions were filed by Mr. Philip D. Doersam and Mr. Carl E. Roliff, *supra*.

2. Washoe County, Nevada (population 121,068), contains the two adjacent communities of Reno and Sparks with their respective populations of 72,863 and 24,187 persons.[2] Three of the four FM commercial channels assigned to Reno are occupied: 238, KNEV(FM), licensed to Mr. Everett B. Cobb; 283, KSRN, licensed to RAESCO, Inc.; and 289, KGLR(FM), licensed to Mr. and Mrs. Philip D. Doersam d/b/a Pendor Communications. The fourth commercial FM assignment, Channel 295, has two applications pending for its use: BPH-7735, filed on January 10, 1972, by B.B.C., Inc. and BPH-7855, filed on March 14, 1972, by KIDD Communications, Inc. A noncommercial educational FM station, KUNR, licensed to the University of Nevada, presently serves the community on noncommercial educational FM Channel 201. The following standard broadcast stations are also licensed in Reno: KBET, licensed to Sierra Broadcasting Company; KCBN, licensed to B.B.C., Inc.; KCRL, licensed to Capital C, Inc.; KOBY, licensed to KOBY (a daytime-only station); KOH, licensed to McClatchy Newspapers; KOLO, licensed to Western Broadcasting Co.; and KONE, licensed to Lotus Broadcasting Corp. Sparks, Nevada has but one FM assignment, Channel 252A, which

[1] By letter dated February 23, 1972, the name of Mr. Donald W. Hollister of Kelly Broadcasting Co. (KPTL) was withdrawn as a petitioner in this matter.

[2] Population statistics cited are from the 1970 U.S. Census unless otherwise specified.

has no application pending for its use. One standard broadcast station is licensed in Sparks, KBUB, a daytime-only station, presently licensed to Mr. John B. Aymar, receiver. On September 5, 1972, the Commission received an application to assign this facility to Trans Sierra Meter, Inc.

3. Petitioners' core argument is simple and direct—they assert that there are 12 local radio signals in existence in Reno and Sparks. When combining this fact with the size of the population of the two communities, *supra*, they conclude that the population of the two communities cannot support the addition of further radio services in the communities, i.e., that the ratio of aural facilities to the population to be served is too high.[3] Therefore they maintain that Channel 295 at Reno and Channel 252A at Sparks should be deleted as assignments by the Commission in order to guarantee the existing licensees the economic support they presently have by protecting them from further competition. Petitioners recite the facts that distant signals are received off-the-air and on the local cable system from other cities. With regard to the variety of radio services available, petitioners state:

> Of the existing radio stations in the area, every network, and every format is well represented in accordance with the population distribution, needs, and interests of the community; i.e., classical, contemporary, young sound, adult, standard pops, middle-of-the-road, country and western, jazz, religious, talk, editorials, FM stereo, local coverage of high school and college sports, plus extensive news coverage at all levels. . . .

In conclusion, they maintain that Reno and Sparks have more radio signals than other cities of comparable size and that the present economic state of the existing radio operations is poor.

4. B.B.C., Inc., licensee of standard broadcast Station KCBN in Reno, Nevada, opposes the petition stating in effect that it views a new FM service for Reno on Channel 295 as both feasible from an economic view and desirable from a public interest standpoint. It reminds us of its pending application for a new FM service on Channel 295 (BPH–7735)[4] and alleges that the proposed station has been in the planning stage since August 1971, several months previous to the filing of the instant petition. B.B.C., Inc., underscores the thought that petitioners' request is not based on any factor, which may be in the public interest, other than economic protection of the existing radio services. Concerning the importance of Reno and the need of the community for additional service it states:

> The population of Washoe County (in essence Reno and Sparks) is 121,068 . . ., an increase of 42.9% from 1960. The population of Nevada is up 71.3%. The Reno-Sparks area is one of the most rapidly growing areas in the United States. Because Reno is remote from other urban concentrations and is the hub of the whole Northern Nevada area, its population and significance are greater than would be the case of a larger place located somewhere else. Reno is the home of the University of Nevada, the center of ranching and other agricultural interests, and is an important recreation center and headquarters for the Reno-Tahoe area. . . .

B.B.C., Inc., states that in its view, any radio signals serving Reno and Sparks from other communities, be they provided off-the-air or

[3] Although there are 12 local aural stations licensed to serve Reno and/or Sparks we note that 11 are commercial services, dependent on advertising revenue.

[4] In addition to B.B.C., Inc.'s application, KIDD Communications, Inc. has also filed for the use of Channel 295, BPH–7855, *supra* paragraph 2.

on the local cable system, are irrelevant since such stations are licensed to serve other communities and therefore are providing programming which is primarily pertinent to the needs of other cities. It concludes its statement by indicating that it plans, on Channel 295, a basically unduplicated service which will provide a different musical format plus availability of extensive local news and community oriented public affairs programming. The second opposition to the petition, filed by Mr. Everett B. Cobb, licensee of KNEV (FM), Reno, Nevada, basically supports B.B.C., Inc.'s position by pointing out similar facts. It makes a particular point of the fact that the Reno/Sparks area has an extremely large, nonpermanent resident, tourist population.

5. Two individual replies were filed in response to the oppositions of B.B.C., Inc., and Mr. Everett B. Cobb: the first from Mr. Philip D. Doersam, Pendor Communications, KGLR (FM) and the second from Mr. Carl E. Roliff, RAESCO, Inc., KSRN (FM) (two of the original four petitioners). Their filings primarily reiterate the views set out in the original petition, assert that Channel 295 and Channel 252A have been lying fallow for some time (drawing the conclusion from this that the applicants for Channel 295 in some way have been negligent by not filing earlier), and request that a rule making hearing concerning the matters raised by the petition be held in Reno.

6. The fundamental point of difference between petitioners and those who wish to retain Channel 295 and Channel 252A at Reno and Sparks, respectively, is as follows: Petitioners argue that the population of the two communities is such that they cannot support the addition of further radio service; opponents of the petition aver that additional service is feasible from an economic point of view and is in the public interest, and that petitioners are only seeking economic protection of existing services.

7. We are not convinced that the two channels in question should be deleted, for on the record we cannot make the decision that Reno and Sparks do not now, or will not in the future, need additional radio service. Two parties have each made the business judgment that the area not only requires additional radio programming but that it can support an additional radio service. As we have stated on other occasions, we do not wish to place artificial restraints on competition unless the overall public interest will be adversely affected by competition, and matters of the kind raised by petitioners are best considered at the application stage rather than in a rule making proceeding. Hence, as to activation of a new station on Channel 252A at Sparks, we observe that a *Carroll* issue can be raised in connection with any application that may be filed for use of the channel. As to Channel 295 at Reno, two applications for construction permits for new stations are pending. Two of the three petitioners in the instant RM–1882 have filed what may be characterized as informal objections to the grant of one of the applications. Those objections contain some of the arguments raised in the pleadings in RM–1882 which is presently before us and make reference to RM–1882. Those objections will, of course, be given consideration when the Commission acts on the two applications. Moreover, although the time for filing formal petitions to deny has past, there is nothing to prevent parties from

filing further informal objections prior to the time that the Commission acts on the applications.

8. In view of the foregoing, we have come to the judgment that it is not in the public interest to adopt petitioners' proposal to delete Channel 295 from Reno, Nevada, or Channel 252A from Sparks, Nevada.

9. Accordingly, IT IS ORDERED, that the joint petition of Mr. Philip D. Doersam, Pendor Communications, KGLR(FM); Mr. Ray H. Koon, Inspirational Broadcasters, Inc., KNIS(FM); and Mr. Carl E. Roliff, RAESCO, Inc., KSRN(FM), filed with this Commission on November 24, 1971 (RM–1882), requesting the deletion of Channel 295 from Reno, Nevada, and Channel 252A from Sparks, Nevada, IS DENIED.

10. IT IS FURTHER ORDERED, that the request of petitioners for a rule making hearing in this matter, IS DENIED.

11. IT IS FURTHER ORDERED, that this matter (RM–1882) IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1090

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN THE MATTER OF RENEWAL OR REVOCATION HEARING PROCEEDINGS IN FUTURE FRAUDULENT BILLING CASES

DECEMBER 7, 1972.

The Commission by Commissioners Burch (Chairman), Robert E. Lee, Johnson, H. Rex Lee, Reid, Wiley and Hooks, issued the following

PUBLIC NOTICE: COMMISSION WILL CONSIDER RENEWAL OR REVOCATION HEARING PROCEEDINGS IN FUTURE FRAUDULENT BILLING CASES

More than a decade ago the Commission notified broadcast licensees that it regarded the practice of fraudulent billing "as contrary to the public interest, and that appropriate proceedings will be instituted in all cases where evidence of double billing by licensees is found to exist." *Public Notice*, March 9, 1962, FCC 62-272. In 1965 the Commission adopted Rules prohibiting fraudulent billing practices and issued a Public Notice illustrating certain specific forms of these practices with which it was familiar. *Report and Order* in Docket 15396, 1 FCC 2d 1068; *Public Notice on* "Applicability of Fraudulent Billing Rule," October 22, 1965, FCC 65-952. By *Memorandum Opinion and Order* released on May 18, 1970, the Commission added language to the Rule to make completely clear the existing prohibition of the Rule against any form of false billing. At the same time two more examples of fraudulent billing practices were added to the Public Notice of October 22, 1965. (The fraudulent billing Rules, originally designated as Sections 73.124 (AM), 73.299 (FM) and 73.678 (TV), are now consolidated as Section 73.1205, which is applicable to all three services.)

During the past ten years the Commission has designated for renewal or revocation hearing a number of cases based in whole or in part on issues involving fraudulent billing. In many other cases, it has imposed forfeitures in amounts ranging up to the statutory maximum of $10,000.

However, the Commission continues to receive fraudulent billing complaints, which frequently are confirmed by staff investigation and thus indicate that past sanctions have by no means accomplished their purpose of causing all licensees to discontinue this practice.

The Commission considers violation of the fraudulent billing rule to be a particularly serious one because it involves participation by the licensee in a fraud, and thus raises serious questions as to his qualifications to remain a licensee. Therefore, it intends to examine each case more closely in light of the questions raised as to the licensee's qualifications.

F.C.C. 72-1118

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

HUGHES SPORTS NETWORK, INC., NEW YORK, N.Y., COMPLAINANT

v.

Docket No. 16043

AMERICAN TELEPHONE & TELEGRAPH CO., NEW YORK, N.Y., DEFENDANT

MEMORANDUM OPINION AND ORDER

(Adopted December 13, 1972; Released December 18, 1972)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE AND REID DISSENTING; COMMISSIONER HOOKS ABSTAINING FROM VOTING.

1. On June 3, 1965, Sports Network, Inc., the predecessor in interest of Hughes Sports Network, Inc. (HSN), filed a complaint against the American Telephone and Telegraph Company (AT&T), alleging that tariffs covering the provision of television interexchange channel service were unreasonable, discriminatory, and unlawful under Sections 201 and 202 of the Act, because minimum service periods for both monthly and occasional service were prescribed without regard to the purchaser's actual use. After completion of the hearing specified by our order, 3 FCC 2d 618, released May 6, 1966, the Initial Decision, 25 FCC 2d 560, and the Review Board's Decision, 25 FCC 2d 550, both concluded that AT&T's tariffs were unreasonable, discriminatory, and unlawful when applied to part time users, but that HSN had failed to sustain its burden of proof on the issue of monetary damages.

2. However, by our Memorandum Opinion and Order, 34 FCC 2d 691, released May 1, 1972, we remanded this proceeding for a further hearing to assess the extent of HSN's monetary damages, if any, due to AT&T's excessive charges for monthly and occasional service. Noting that AT&T's tariffs were found to be both unjust and unreasonable under Section 201(b) of the Act and unduly discriminatory under Section 202(a) and that the imposition of a charge which is unlawful because it is unreasonably high entitles the customer to reparation of the excessive amount without regard to whether or not the damages were passed on to other parties, we held that the proper measure of damages in this case is the difference between the amount paid and the reasonable rate. Under these circumstances, we concluded that HSN's claim for damages for monthly service had not been appraised under the correct legal standard.

3. Since AT&T has possession of all of the relevant information concerning the reasonable rate for the service provided, we also pointed out that the assessment of damages should be based on the presump-

tion, rebuttable by AT&T, that the reasonable charge for a use of less than eight hours per day is proportionate to the number of hours used, but that, inasmuch as no question had been previously raised concerning the reasonableness of the charges for eight hours of use, AT&T would not now be permitted to urge that the eight hour rate is incorrect. Finally, in view of the facts that a remand was required in any event, that the designation order permits a determination of damages for both monthly and occasional service, and that HSN had already made a showing of its occasional service use, we stated that the public interest would be best served by considering the extent to which HSN is entitled to reparations for excessive occasional service payments.

4. AT&T has filed a petition for reconsideration [1] of our remand order, requesting that the claims of HSN be denied in all respects. AT&T asserts that the remand of this proceeding ignores applicable legal precedent in an unwarranted effort to provide HSN another opportunity to establish its damages. Claiming that the burden of proof as to the amount of damages was properly on HSN, that a complainant is required to prove both the fact and the amount of resulting damages to recover for a carrier's unlawful discrimination or preference, that HSN had a full opportunity but failed to adduce a sufficient record to sustain its burden, and that the remand order will generate a complex and time consuming hearing which may well produce a result distorted by outdated evidence, AT&T urges that HSN should be required to accept the consequences of its failure to prove the amount of its damages in accordance with the holdings of the Initial Decision and the Review Board.

5. AT&T next argues that the remand order incorrectly shifts the burden of proof as to the amount of damages from HSN to AT&T by adopting a *prima facie* presumption that the reasonable charge for use of less than eight hours of service is proportional to the number of hours used. According to AT&T, this presumption does not merely establish who should go forward with the evidence, but shifts the ultimate risk of non-persuasion to AT&T, since the reasonable charge will be proportional to the hours used unless AT&T demonstrates otherwise. Asserting that a presumption may not be used to shift the ultimate risk of non-persuasion from one party to another, AT&T contends that the remand order requires it to prove an element essential to HSN's ultimate burden of proving its damages contrary to Section 204 of the Act which places the burden of proof as to the reasonableness of a rate on the carrier only for an increased charge.

6. AT&T also claims that, although the remand order is based on an alleged finding that its tariffs were unreasonably high, neither the Initial Decision nor the Review Board made such a finding. AT&T argues that all of HSN's testimony was directed toward what rate structure should be prescribed, that HSN introduced no evidence showing that the rate structure for monthly service was unreasonable or discriminatory for any past period, and that there are no findings unrelated to the discrimination question which would support an independent conclusion of unreasonableness. Under these circumstances,

[1] AT&T's petition was filed on May 31, 1972. In addition, HSN filed an opposition on June 14, 1972, and AT&T filed a reply on June 30, 1972.

AT&T asserts that there is no basis for measuring damages merely on the difference between the amount paid and the reasonable rate and that HSN is being given another opportunity to sustain its burden of proof under a new theory for measuring damages based on considerations having no support in the record.

7. AT&T then argues that the remand order is both unfair and unsupportable in precluding it from showing that the eight hour rate is incorrect. Claiming that it had no obligation to adduce evidence concerning the reasonableness of that charge when it was not in issue and that it did not thereby waive or otherwise lose its right to do so, AT&T urges that such a conclusive presumption may not accord with the facts. Since the reasonable charge for less than eight hours of use is inextricably woven into the reasonable rate for eight hours, AT&T contends that, if it is not permitted to establish a reasonable rate for eight hours, the determination of the reasonable rate for less than eight hours may bear no relationship to reality, rendering the measure for reparations invalid. Finally, AT&T asserts that no further hearing is required with respect to HSN's claim for damages stemming from its use of occasional service, because the subsequent reduction of the rates for occasional service does not establish a reasonable rate for the prior period.

8. Although we have carefully examined AT&T's pleadings, we are not persuaded that it has raised any matter which was not fully considered or which would require a different result in our remand order. Thus, AT&T's principal contention that the burden of proof has been improperly shifted is without merit. While AT&T is correct that HSN must bear the ultimate burden of proof, under the circumstances of this proceeding where HSN has made a *prima facie* showing of damage and where the relevant information for measuring the actual injury is solely within the possession of AT&T, it is both logical and proper to shift the burden of going forward with the evidence to AT&T in order to determine the reasonable rate. Contrary to AT&T's assertions, the remand order does no more than this; the ultimate risk of nonpersuasion as to the extent of HSN's damages still remains on HSN.

9. AT&T's next argument that the record contains no finding that the tariffs in question were unreasonably high is simply not correct. Both the Initial Decision and the Review Board, relying on AT&T's failure to show any cost justification for the rates charged users of less than eight hours of service, found the tariffs to be unjust and unreasonable under Section 201(b) of the Act, See 25 FCC 2d 550, at 555, and 25 FCC 2d 560, at 598. Furthermore, the Initial Decision approvingly quoted a Common Carrier Bureau statement that no reason or justification appeared for the level of the charges imposed by AT&T, 25 FCC 2d 560, at 578, and the Review Board held that the record supported the Initial Decision's findings of fact. In view of AT&T's failure to make an adequate evidentiary showing on this record justifying the rates charged to HSN, 25 FCC 2d 550, at 554, AT&T's contention that the tariffs were not unreasonably high must be categorically rejected.

10. By the same token, AT&T's assertion that HSN should be bound by the prior holdings that it had not made a sufficient showing of damages is not persuasive. The determinations of the Initial Decision

and the Review Board are obviously not binding here, since HSN's showing was appraised under an incorrect legal standard and since a different standard has been enunciated as the proper measure of HSN's injury in our remand order. While AT&T also claims that it is being improperly precluded from showing that its eight hour rate was incorrect, we specifically noted that no question had been raised previously concerning the reasonableness of the eight hour rate. Since AT&T originally established and retained the eight hour rate on its own initiative, we do not believe that it would be either fair or appropriate to permit AT&T to suggest at this stage of the proceeding that its long established charges might be unreasonably low.

11. Finally, AT&T's objection to further consideration of HSN's claim for damages based on its use of occasional service is equally unfounded. As noted above, the rates in question were found to be unreasonable, and HSN has already made a showing of its occasional service use as permitted by the designation order. Although AT&T is correct that its new rate is not necessarily controlling, this situation is comparable to HSN's monthly service claim, because it has been established that AT&T's rates were unreasonable, HSN's claim has never been appraised under a correct legal standard, and a remand will allow a determination to be made of the reasonable rate to measure the extent of HSN's injury, if any. For the reasons set forth above, we are firmly convinced that the public interest will be best served by further consideration of HSN's claims for its use of both monthly and occasional service and that AT&T's petition for reconsideration should be denied in all respects.

12. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by the American Telephone and Telegraph Company on May 31, 1972, is denied.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1027

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of ITT WORLD COMMUNICATIONS INC., PRESS WIRELESS, INC. Application for Requisite Commission Authorizations With Respect to the Proposed Merger of Press Wireless Inc., Into ITT World Communications, Inc.	Files Nos. 6463-C4-AL-68 6464-C4-AP-AL-68 T-C-2192 S-C-L-32-1 T-D-15787

MEMORANDUM OPINION AND ORDER

(Adopted November 15, 1972; Released November 22, 1972)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. The Commission has for consideration a filing by the Communications Workers of America (CWA) dated December 1, 1970 requesting that the Commission order ITT World Communications, Inc. (ITT) to process a CWA complaint using the procedures specified in two Commission decisions, *ITT World Communications Inc.*, 21 F.C.C. 2d 426 (1970), and *ITT World Communications Inc.*, 25 F.C.C. 2d 88 (1970).[1] The CWA complaint alleges that ITT laid off five employees in violation of the provisions in Paragraph 1 of Appendix A of *ITT World Communications Inc.*, 1 F.C.C. 2d 213 (1965), relating to the transfer of control of Press Wireless to ITT.

2. In that 1965 decision the Commission authorized the transfer of control of Press Wireless to ITT, and included an Appendix A setting out certain provisions for the protection of employees employed by the carriers involved in that transfer. Paragraph 1 of such Appendix provides, in part, that during a period continuing up to July 28, 1971 no employee should have his employment terminated or be laid off as a consequence of the transfer of control approved by the Commission.[2] CWA asserts that after the transfer of control of Press Wireless to ITT, ITT closed a Press Wireless facility located in Northville, New York, and shifted operations of that facility to ITT's Brent-

[1] The first decision was released by the Commission on February 16, 1970 and the second decision was released on September 1, 1970.

[2] Paragraph 1 of Appendix A reads as follows: *That during the period* commencing six months prior to the instant application for approval of transfer of control and *continuing for six years from the date of the approval of such application, no employee of any carrier* (including subsidiaries thereof) *which is a party to such application* regardless of his period of employment, *shall,* in contemplation of or *as a consequence of such transfer of control have his employment terminated,* or be suspended, discharged, furloughed or laid off, or have his compensation reduced or be assigned to work which is inconsistent with his past training and experience in the telegraph industry, by any carrier (including subsidiaries thereof) which is a party to such application by which he was employed prior to the approval, or by the carrier to which control may be transferred which latter carrier (including subsidiaries thereof) shall be obligated to continue his employment upon approval of such application. (Emphasis supplied.)

wood and Southhampton, New York facilities. As a direct result of ITT's decision to close the Northville plant, CWA continues, five former Press Wireless employees were shifted to ITT's Brentwood facility and on November 19, 1969, ITT laid off five ITT employees with less seniority than the five transferred former Press Wireless employees. CWA, using the grievance procedure prescribed in the collective bargaining agreement, filed a complaint with ITT alleging that the layoff was a consequence of the transfer of control, and that therefore paragraph 1 of Appendix A to the Commission's 1965 decision was violated. ITT contended that the layoff was not a consequence of the transfer of control. After processing the complaint through two steps of the grievance procedure and not having the matter satisfactorily resolved, the CWA, by letter of January 6, 1970 to ITT, withdrew its complaint without prejudice. After the Commission decisions in 1970 in which the procedures for processing Appendix A complaints were prescribed, the CWA again filed their complaint with ITT requesting that it be processed pursuant to these procedures. After ITT refused to do so, the CWA requested that the Commission order ITT to process their complaint.

3. Letters have been filed by both CWA and ITT commenting on the positions of the other regarding this matter and on certain questions raised by the Commission in correspondence with the parties. We are not presently concerned with the merits of the CWA complaint, but rather with the questions of whether that complaint is subject to consideration pursuant to procedures established by the Commission and, if it is, how it should be processed. The Commission's 1965 decision approving the transfer of control of Press Wireless to ITT, while providing certain employee protection provisions in Appendix A, did not specify the procedures that parties should follow in processing complaints which alleged violations of Appendix A. In its decision of February 16, 1970, the Commission for the first time set forth procedures for the processing of the aforementioned complaints. The Commission ordered that, to the extent practicable, Appendix A complaints should be resolved by the usual employer-employee dispute procedures. Specifically, it required that complaints be considered under the grievance procedures [3] and then, if necessary and the parties desire, under the arbitration procedures of the collective bargaining contract. In addition, the decision provided for Commission review of the final outcome resulting from these procedures. ITT petitioned for partial reconsideration and this resulted in the Commission's decision of September 1, 1970 which modified in some respects the previously specified procedures. In this modification, the Commission, persuaded that arbitration may not be necessary in every instance, authorized a direct appeal to the Commission when a dispute could not be resolved in the grievance procedure. It also provided that the Commission would then determine any further procedures necessary to resolve the complaint. On October 20, 1970, ITT submitted its agreement and undertaking to settle Appendix A complaints in a manner set forth in the Commission's February 16, 1970 decision as modified by the Septem-

[3] The decision noted, however, that time limitations contained in the grievance procedures of the applicable collective bargaining agreement should be disregarded, *ITT World Communications Inc.*, 21 F.C.C. 2d 426, 435 (1970).

ber 1, 1970 decision. Within a month thereafter CWA sought to avail itself of the specified procedures by asking ITT to process its complaint. ITT, however, considered the matter closed and refused to process it. CWA then filed an appeal to the Commission requesting that ITT be ordered to process its complaint.

4. ITT contends first that since the CWA withdrew its grievance on January 6, 1970, the Commission is precluded from applying to the CWA complaint the procedures it prescribed in February and in September of 1970. To support this contention, ITT cites language in our February 1970 decision to the effect that the prescribed procedures shall apply to alleged violations of Appendix A that may exist now or arise in the future. In view of this language, ITT concludes that consideration by the Commission of the previously withdrawn CWA complaint pursuant to the procedures prescribed in February and September of 1970 would give our procedures an unwarranted retrospective effect. In a second general contention, which ITT states is based on the equitable doctrine of laches, ITT argues that the Commission, in prescribing procedures, did not intend to reopen matters in which the aggrieved party failed to pursue remedies existing when the issue was ripe for consideration and that the CWA is therefore now barred from processing their complaint pursuant to our procedures.

5. In considering ITT's contention that the Commission's prescribed procedures are not applicable to CWA's previously withdrawn grievance complaint because such an application would give the procedures a retrospective effect not warranted by the language of the decision setting forth the procedures, it is necessary to look at the Commission's intent in setting forth those procedures. In 1970, when the Commission first prescribed procedures to be followed, it was attempting to remedy the deficiency in its 1965 decision which failed to specify the course parties should follow in pursuing an alleged violation of Appendix A. Thus, in 1970 the Commission was for the first time providing a formally approved and agreed-upon method of resolving such disputes. We do not believe it would be consistent with this remedial intent for the Commission to consider closed the CWA complaint that was processed through two steps of grievance procedure and withdrawn without prejudice. Viewing the issue from this perspective, we do not believe it would be appropriate to consider that the alleged violation of Appendix A had ceased to exist after having been withdrawn without prejudice from grievance procedure in January 1970.

6. While the exact nature and relevance of ITT's general allegation of laches is not entirely clear from the pleadings, it apears that ITT is primarily concerned with our now considering CWA's complaint pursuant to our prescribed procedures in light of the fact that the CWA, in 1970, did not pursue the matter beyond the second step of the grievance procedure. This issue does not go to the question whether the prescribed procedures apply to a previously processed complaint, but rather to the question of whether the CWA's withdrawal itself and the failure to pursue its complaint prejudiced ITT to such an extent that it would be inequitable to now require ITT to process it. Approximately one month after the CWA's withdrawal of its complaint, in February 1970, the Commission adopted its decision which

for the first time prescribed procedures to be used in resolving Appendix A disputes. Due to an ITT requested reconsideration of that decision, however, the final nature of those procedures was not resolved until October 20, 1970. It was clearly not unreasonable for the CWA to await the final outcome of the Commission's reconsideration of the previously prescribed procedure before further processing their complaint. In light of the foregoing, we do not believe, and ITT has not shown, that CWA's conduct was in any way unreasonable or prejudicial to ITT so as to support a claim of laches.

7. Given these circumstances, we are of the view that no extended discussion is necessary to determine that neither law nor equity should bar consideration of CWA's complaint. We note in this regard that ITT has not indicated how its rights would be prejudiced by processing this complaint, but did indicate that permitting such processing might open it up to a multitude of similar complaints which may cumulatively result in considerable liability to the company. We note in regard to this latter assertion that there has not been a multitude of similar complaints filed and such other complaints as may be filed will be considered on their facts which may, of course, indicate that they should be barred by the application of laches or other equitable or legal considerations. In this regard, it is significant to note that the six year protection period specified in Appendix A expired on July 28, 1971 and thus it is unlikely that many additional complaints will arise.

8. In the instant case the complaint in question, as noted above, has already been processed through two steps of the grievance procedure. Accordingly we believe that no useful purpose would be served by reinstituting the entire grievance procedure; and thus we are providing that the parties proceed directly to the third stage of the grievance procedure.

9. Finally, we turn to the question of what procedure should be followed if the complaint is not satisfactorily resolved at the third stage of grievance. In its February 16, 1970 decision, the Commission specified that complaints unresolved under the grievance procedure should be settled by arbitration. This determination was modified by the Commission's September 1, 1970 decision, which left open for Commission determination on a case-by-case basis what steps would be taken if a complaint was not resolved under the grievance procedure. The dispute in the instance case has already been the subject of extensive correspondence between the parties and the Commission, and we therefore believe it would be appropriate and in the interests of a timely ultimate resolution to specify now the procedure that should be followed if the matter is not resolved at the third stage of grievance.

10. An examination of all the pertinent facts and circumstances leads us to conclude that the questions involved in settling the dispute herein make it appropriate for consideration under the arbitration provisions of the union contract. The question of whether the disputed layoffs were in fact a consequence of the transfer of control approved by the Commission, includes, among other things, matters relating to the changes in ITT's operations, seniority, possible reinstatement, and back-pay, as well as interpretation of provisions of the contract between CWA and ITT. We therefore believe that CWA should have

the right to take its complaint to arbitration under the procedures specified in its labor contract with ITT.

ORDER

Accordingly, IT IS ORDERED, that ITT is directed to process the subject complaint of CWA through the third step of the grievance procedure specified in the labor contract presently in effect between ITT and CWA; and

IT IS FURTHER ORDERED, that after completion of the grievance procedures, either party, without further Commission action, shall have the right to have the complaint arbitrated in accordance with the procedures set forth in such labor contract.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re application of KENTRON HAWAII, LTD., HONOLULU, HAWAII For Transfer of Application for Renewal of License From Bendix Field Engineering Corp. to Kentron Hawaii, Ltd.	File No. 45–CSG–R–73

JANUARY 5, 1973.

Air Mail
KENTRON HAWAII, LTD.,
233 Keawe Street,
Honolulu, Hawaii 96813
Attention: Mr. M. W. Elliott

GENTLEMEN: This is in regard to your application File No. 122–CSG–AL–73 filed on December 27, 1972, requesting that the pending application (File No. 45–CSG–R–73) for the renewal of the license for the Space Research Earth Station (KA22) at Fairbanks, Alaska be transferred from the Bendix Field Engineering Corporation (Bendix) to Kentron Hawaii, Ltd. (Kentron) and that Kentron be authorized to operate this station effective midnight (local time) December 31, 1972.

You state that Kentron is incorporated under the laws of the State of Hawaii and that Kentron is a wholly owned subsidiary of the LTV Aerospace Corporation. The transfer of this license from Bendix to Kentron is necessary because the contract to operate this station to provide operations and maintenance services to the European Space Research Organization (ESRO) has been awarded to Kentron, and the responsibility of Bendix to provide these services to ESRO will terminate at midnight December 31, 1972, at which time Kentron will assume this responsibility under the contract.

By letter dated January 2, 1972, you were informed that on December 29, 1972 the Commission, Commissioner Johnson concurring, granted a license extension, on its own motion, to Bendix through January 5, 1973, pending consideration of the application for the assignment of the license of the ESRO earth station (KA22) from Bendix to Kentron. At the same time, the Commission also stated it would not object to Kentron acting as agent of Bendix during the period January 1 through 5, 1973, inclusive, with respect to the operation of this station if such a course of action were deemed advisable in view of the ESRO/Kentron management contract effective January 1, 1973, in lieu of the ESRO/Bendix management contract.

On the basis of the information submitted by Kentron, it appears that Kentron is legally, technically, financially and otherwise qualified

109–024—73——6

to operate this station and that the grant of this application will serve the public interest, convenience and necessity.

Pursuant to Section 310(b) of the Communications Act of 1934, as amended, the Commission hereby consents to the assignment of the operating authority for the Space Research Earth Station (KA22) from Bendix Field Engineering Corporation to Kentron Hawaii, Ltd., effective midnight (local time) January 5, 1973.

Kentron Hawaii, Ltd. is hereby authorized to operate the Space Research Earth Station at Fairbanks, Alaska with ESRO satellites and satellites launched on ESRO's behalf for a license term commencing at midnight (local time) January 5, 1973 and terminating at midnight (local time) December 31, 1973 in accordance with the following technical specifications:

Nature of Service: Space Research.

Class of Station: Space Research Earth Station.

Call Sign: KA22.

Location of Station: North Star Borough, Fairbanks, Alaska.

Antenna: 64°55′47.521″ North Latitude; 147°29′39.278″ West Longitude.

Communications Transmitters:

Type: 1. THR—712 Compagnie—Francais Thomson-Houston Linear Amplifier. 2. THR—713 Compagnie—Francais Thomson-Houston Linear Amplifier.

Frequencies of Operation: 148.250 MHz; 149.820 MHz (for command transmitter system testing only).

Power at Antenna Feed: 2000 Watts or 200 Watts.

Emission: 30 A9.

Antenna:

Type: Phased dipole array.

Gain: 21.42 db relative to an isotropic dipole.

This license is subject to the following terms and conditions:

(a) Transmission of call sign not required;

(b) Aural monitoring of transmissions not required;

(c) No protection from established U.S. Government operations on 148.23 MHz will be provided;

(d) This license subject to termination at any time without hearing;

(e) Prior coordination with the NASA Alaska Data Acquisition Facility, P.O. Box 1370, Fairbanks, Alaska, is required;

(f) This license shall not vest in the licensee any right to operate the station nor any right to the use of frequencies designated in the license beyond the term thereof nor in any other manner than authorized herein;

(g) Neither this license nor the right granted herein shall be assigned or otherwise transferred without approval of this Commission; and

(h) This license is subject to the right of use or control by the Government of the United States conferred by Section 606 of the Communications Act of 1934, as amended.

Sincerely yours,

BEN F. WAPLE, *Secretary.*

F.C.C. 72-1069

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re request by
THEODORE F. KOOP, WASHINGTON, D.C.
For Waiver of Divestment Requirement
in the CBS-Viacom "Spin-Off"

NOVEMBER, 29, 1972.

Mr. THEODORE F. KOOP,
2737 Devonshire Place NW.,
Washington, D.C. 20008

DEAR MR. KOOP: This refers to your request of July 17, 1972 for waiver with respect to the divestiture conditions set forth in the Commission's June 1971 decision concerning Columbia Broadcasting System, Inc. and Viacom International, Inc. (*Columbia Picture Industries, Inc.*, 30 FCC 2d 9), and of your commitment pursuant to that decision to divest yourself of all Viacom stock received in the CBS-Viacom "spin-off".

It appears that you, as a CBS Vice President at that time and previously, were included in the categories of individuals to whom the conditions applied. However, you state that you retired as a CBS vice president December 31, 1971, and left that company's employ March 31, 1972, and that you have no intention or prospect of becoming a CBS officer, director, or employee in the future. You state that your holdings of stock in the two corporations (787 shares of Viacom and 5,834 of CBS, plus 438 more shares of CBS due you eventually in a deferred compensation plan) are far under the 1% mark which the Commission considers, here and elsewhere, to be significant even in the absence of officer or director status (about 0.2% of the stock in each company).

Therefore it appears that the factors, which led to the conditions mentioned, no longer apply in your case and that waiver is warranted. However, it appears appropriate to condition such waiver on your not acquiring a position with CBS in the future which falls within the categories set forth in the decision as subject to the condition.

Accordingly, waiver of the conditions imposed on CBS officials in the *Columbia Picture Industries, Inc.* decision (30 FCC 2d 9, June 1971), and of your commitment to divest yourself of Viacom stock entered into pursuant thereto, is granted. However, this waiver shall cease to apply if at any time you again become an officer or director of CBS, or otherwise become a member of the group of individuals to whom the conditions were applied in that decision.

BY DIRECTION OF THE COMMISSION
BEN F. WAPLE, *Secretary.*

F.C.C. 72–851

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
ALFRED MENTER, D.B.A. MENTER RADIO SERVICE. FULTON, N.Y.	
For a Construction Permit To Establish a New One-Way Signaling Station in the Domestic Public Land Mobile Radio Service at Fulton, N.Y.	Docket No. 19594 File No. 7083–C2–P–71
TEL-PAGE CORP., JAMESVILLE, N.Y.	
For a Construction Permit To Establish Additional One-Way Signaling Facilities for Station KRH631 in the Domestic Public Land Mobile Radio Service at Jamesville, N.Y.	Docket No. 19595 File No. 825–C2–P–72

MEMORANDUM OPINION AND ORDER

(Adopted September 27, 1972; Released October 3, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it for consideration the above-captioned applications to establish one-way signalling facilities in the Domestic Public Land Mobile Radio Service (DPLMRS). Since both applicants propose to operate radio stations on the same radio frequency and in the same general geographical area, the applications are considered mutually exclusive because of potentially harmful electrical interference. The applications must, therefore, be designated for a comparative evidentiary hearing to determine whether the public interest, convenience, and necessity would be better served by a grant of either the application of Alfred Menter, d/b as Menter Radio Service ("Menter"), or the application of Tel-Page Corporation ("Tel-Page"). *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945)

2. It appears from the Menter application that Menter Radio Service is personally owned by Alfred Menter whose place of business is at 706 S. First Street, Fulton, New York. Mr. Menter is engaged full-time in the ambulance service in the Fulton, New York, area, and has a business interest in the Oswego County Ambulance and Hearse Service, which is the licensee of Business Radio Station KRM591. Fulton, New York, is located in Oswego County about 20 miles northeast of Syracuse, and has a population of approximately 16,000. In addition to Fulton, Menter proposes to serve the Phoenix and Oswego, New York, areas with populations of 9,000 and 20,000 respectively (Application, Exh. 10).

3. Menter proposes to operate a new tone-only and tone-plus-voice paging service from a base station 0.4 mile northeast of Fulton, and controlled from his present place of business at 760 South First Street in Fulton. The Menter application alleges a need for the proposed service based upon a request from Lee Memorial Hospital for a paging system to enable the hospital staff, not only to contact its physicians in case of emergency when they are away from the hospital, but also to page the nurses within the hospital without resorting to a patient-disturbing wired intercom system. Other business establishments which have been surveyed and have expressed a need for the service are: Nestles Chocolate Company; six funeral directors; eight attorneys; and Sealright Corporation. The station proposed by Menter would operate initially 16 hours a day, seven days a week; but would expand its operation to 24 hours if there should be sufficient future demand for its proposed service. (Menter Application, Exh. 10)

4. Maintenance and repair of the facilities proposed by Menter would be provided on a 24-hour basis by Leo-Mac Radio Service, Inc. of Syracuse, New York; and it is estimated that it will require approximately two hours for service personnel to reach the base station transmitter (Menter Applic., Exh. 7). Mr. Menter would be responsible for the operation of the proposed system on a day-to-day basis; and the Menter application also states that he will have four employees who will devote four hours a day each to "develop, achieve, and maintain the best possible service to their subscribers." In addition, Menter will do its own dispatching. (Menter Applic., Exh. 8). The Menter application also states that Mr. Menter will spend approximately eight hours a day at the proposed facility; but when he is not at the station he would be in "constant touch" with the station by telephone. He will also institute a training program to ensure that all employees of the station "are fully versed with all the applicable FCC Rules and Regulations concerning the proposed operation," and "that common carrier matters should be given priority over noncommon carrier matters." In addition, all proposed subscribers will be members of the public (Menter Applic., Exh. 9).

5. Menter's financial qualifications are stated to consist of current assets of $24,011.16 of which nearly $11,000 is cash on hand or in banks. Current liabilities are only $30.00; and capitalization is $110,-164.54. (Balance sheet dated April 30, 1971 (unaudited), Menter Applic., Exh. 6). Since the total cost of the proposed facilities is estimated to be $4,618.00 (Menter Applic., Item 47), the financial resources of Menter appear to be completely adequate to meet the construction expenses of the proposed facility, and to operate it for a year; and we, therefore, find Menter to be financially qualified to construct the station proposed in his application.

6. Menter proposes to operate a General Electric Type ET–55A transmitter with an input/output power of 180/100 watts and two emissions, 15F2 and 16F3, on 35.22 MHz. The transmitter would be located 0.4 mile northeast of Fulton, New York. The antenna will be mounted on a 60-foot tower, with a 9-foot unity gain antenna. It would appear, therefore, in consideration of all the foregoing that Menter is financially, legally, and technically qualified to construct and operate the proposed station.

7. Tel-Page is a corporation which is the licensee of two-way Radio Station KRH643 and one-way signaling station KRH631, both operating in the DPLMRS in Syracuse, New York. The Tel-Page application proposes a Motorola Type CC–1044–C transmitter with an input/output power of 500/330 watts with 15F2 emission on 35.22 MHz, located at Jamesville, New York. Jamesville is approximately 6 miles southwest of the center of Syracuse.

8. Tel-Page is, also, the licensee of thirteen radio stations in the DPLMRS in northern New York State, and one in Rutland, Vermont. In addition, Tel-Page is the licensee of Public Coast Station KLU788 in Rochester, New York. The principal office of Tel-Page is in Rochester, New York; and its principal stockholders appear to be Salvatore J. Albano (President), Donald J. Lemon, Angel S. Grande, Frank A. DiMino, and James Lustumbo. (FCC File 4245–C2–P–69, Station KRH631, Exh. 3).

9. While the technical and legal qualifications of Tel-Page to be a licensee do not appear to offer any problem, the matters of financial qualification to construct the proposed station, as well as the showing of need, pose questions which, we believe, require some extended consideration. The Tel-Page application estimates the cost of establishing the proposed one-way signalling facilities at $5,500 of which 10% would be the down payment with the balance paid over a 60-month period, per a standard Motorola Lease-Purchase Agreement. Operating costs appear to be low, because Tel-Page proposes to use existing operational and maintenance staffs for the new facilities (Applic., Exh. 4). Tel-Page appears to have an adequate line of credit with Associates Capital Services Corp., Chicago, Illinois. The line of credit has apparently existed since 1968, and is for use by Motorola Communications and Electronics, Inc. in discounting leases or contracts for Motorola radio equipment which was ordered from it by Tel-Page. This line of credit was apparently increased by $500,000 in February 1971. (Tel-Page Applic., Exh. 3). Our general rule of financial qualification is to ensure that the applicant has sufficient funds to cover the cost of constructing the proposed facilities and operating them for a year; and upon full consideration of all the financial data available to us we find Tel-Page financially qualified. While the balance sheet submitted by Tel-Page discloses total current assets of $56,087.74, as of March 31, 1971, and a retained earnings deficit of $157,387.32, nevertheless net income for Station KRH631 from DPLMRS operations for the year 1971 was $6,700 with net income from all sources stated to be $6,613. (Annual Report for 1971 (Form L) filed April 20, 1972). In addition, Tel-Page's net income from DPLMRS operations for all fourteen of its stations was stated in another Annual Report (Form L) filed the same date, to be $32,687, with a net income from all sources of $13,712. Considering the cost of the new facilities ($5,500) and the financing terms, which require a down payment of only $550, and repayment of the loan over a 60-month period, as well as the above-described sources of income available to Tel-Page we find Tel-Page to be legally, financially, and technically qualified.

10. In Exhibit 4 to its application, Tel-Page states that there is a "significant need for a tone-only paging facility in the greater Syracuse area;" and that the proposed station looks toward meeting that

demand in the Jamesville-Syracuse area. The Exhibit also states that the proposed station would be used exclusively for tone-only paging with its presently licensed one-way signalling station reserved for tone-plus-voice paging.[1] At the time of filing the application (August 1971) Tel-Page was serving over 20 tone-only units on the Guardband channel, but it expected to be serving 100 tone-only subscribers within a year from that date. However, in March 1972 in response to a Commission letter raising questions about the showing of need for the additional one-way signalling channel, Tel-Page informed the Commission that it had 42 paging units in service on its one-way signalling channel, of which 13 were of the tone-only type (Ltr., Tel-Page to FCC, dated March 31, 1972). Tel-Page submitted a channel loading study to the Commission on May 18, 1972, which discloses that Tel-Page has no "held orders" for one-way signalling service; that there are four subscribers using 13 units who would be moved from the high band (158.70 MHz) paging channel to the low band (35.22 MHz) channel; and that Tel-Page has received inquiries from "several persons" in the area indicating interest in the tone-only service, if Tel-Page is licensed to provide it. The Channel Loading Study dated April 26, 1972, shows Tel-Page serving 51 pagers with the peak hour from 10:00 a.m. to 11:00 a.m. During that time 24 pager calls were tabulated, using a total time of 12 minutes. It would appear that there is a substantial question as to which applicant has the greater need for a one-way signalling channel. We will, therefore, include issues regarding the needs of Tel-Page and Menter for their proposed facilities.

11. Accordingly, in view of the foregoing, IT IS ORDERED, pursuant to Sections 309 (d) and (e) of the Communications Act of 1934, as amended, that the captioned applications of Alfred Menter, d/b as Menter Radio Service, and Tel-Page Corporation are DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING upon the following issues:

1. To determine the nature and extent of services proposed by each applicant, including the rates, charges, personnel, practices, classifications, regulations, and facilities pertaining thereto.

2. To determine the total area and population to be served by Alfred Menter, d/b as Menter Radio Service, within the 43 dbu contour of his proposed station, based upon the standards set forth in Section 21.504 of the FCC Rules and Regulations; and to determine the need for his proposed service in that area.[2]

3. To determine the total area and population to be served by Tel-Page Corporation within the 43 dbu contour of its proposed station based upon the standards set forth in Section 21.504 of the FCC Rules and Regulations; and to determine the need for the proposed service in that area.

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[1] Station KRH631, Jamesville, New York, operating on 158.70 MHz, a "Guardband" channel.

[2] Section 21.504(a) of the Commission's Rules and Regulations describes a field strength contour of 43 decibels above one microvolt per meter as the limit of the reliable service area for base stations engaged in the one-way communications service. Propagation data set forth in Section 21.504(b) are a proper basis for establishing both the location of the service contours and the areas of harmful interference for the facilities involved in this proceeding.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if either, of the above-captioned applicants would better serve the public interest, convenience, and necessity.

12. IT IS FURTHER ORDERED, That the burden of proof upon Issue 3 is upon Tel-Page Corporation; the burden of proof upon Issue 2 is upon Alfred Menter, d/b as Menter Radio Service; and the burden of proof upon Issues 1 and 4 is upon both applicants.

13. IT IS FURTHER ORDERED, That the hearing SHALL BE HELD at the Commission offices in Washington, D.C. at a time and place, and before an Administrative Law Judge, to be specified in a subsequent order.

14. IT IS FURTHER ORDERED, That the Chief, Common Carrier Bureau is made a party to this proceeding.

15. IT IS FURTHER ORDERED, That interested parties may avail themselves of an opportunity to be heard by filing with the Commission, pursuant to Section 1.221(c) of the Commission's Rules within twenty days of the release date hereof, a written notice stating an intention to appear on the date set for the hearing and present evidence on the issues specified in this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-82

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of MORBRO, INC. (ASSIGNOR) AND THE CENTRUM CORP. (ASSIGNEE) For Assignment of License of Station KAWA, Waco-Marlin, Tex.	File No. BAL-7575

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 22, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. We have before us for consideration: (1) the above captioned application; (2) a Petition to Deny the application filed July 18, 1972 by KWTX Broadcasting Company, license of Station KWTX, Waco, Texas (hereafter KWTX or petitioner); (3) an Opposition to the Petition to Deny, filed by the Centrum Corporation on August 1, 1972 (hereafter Centrum or assignee); (4) a reply to Centrum's Opposition, filed by KWTX on August 11, 1972; (5) an amendment filed August 28, 1972 by Morbro, Inc. in response to the Petition to Deny (hereafter Morbro or assignor); (6) Assignee's amendment of August 31, 1972; (7) a Supplement to Petition to Deny filed September 15, 1972 by KWTX and (8) a Conditional Request For Waiver filed October 18, 1972 by KWTX.

PROCEDURAL ASPECTS OF THE PETITION

2. Assignee in its Opposition requests that the Petition be dismissed as untimely since it was not filed within the 30-day period provided for under Section 1.580(i) of our Rules. Section 1.580(i) provides that Petitions to Deny must be filed "no later than 30 days after issuance of a public notice of the acceptance for filing any such application . . ." Here the public notice of acceptance of the instant KAWA application was issued on May 15, 1972 and the Petition was not filed until July 18, 1972. In its Reply pleading Petitioner contends that since the instant application is for the assignment of a standard (AM) broadcast station (rather than an FM or TV station), the 30-day provision of Section 1.580(i) does not apply in view of the language in the proviso of the Rule which establishes separate filing times for Petitions against "applications for standard broadcast facilities". These quoted words in the proviso do not refer or apply to assignment or transfer applications. The types of applications covered by words "applications for standard broadcast facilities" are expressly described in Section 1.571 of the Rules (which Section is

specifically cited in the proviso of Section 1.580(i) as applications for new stations, for licenses or for changes in the facilities of authorized stations in the AM band. This Commission has consistently applied the 30-day filing time requirement of Section 1.580(i) to assignment and transfer applications. Accordingly, since the Petition was filed more than 30 days from the issuance of the public notice of acceptance of the instant application it will be dismissed as untimely.[1] *Valley Information Programs Inc.* 1 RR 2d 1077 (1964), *Carnegie Broadcasting Co.* 5 FCC 2d 882, 8 RR 2d 1244 (1966).

3. Although we have dismissed the Petition on procedural grounds we will treat the merits of Petitioner's contentions and those presented in letters which we received from three Marlin residents[2] as informal objections under Section 1.587 of our Rules. Basically, the allegations in the Petition concern (a) the sufficiency of assignor's past and present service to Marlin, Texas and (b) the sufficiency of assignee's proposed service to Marlin. Petitioner also questions the adequacy of assignee's survey of community needs and the food faith of assignee's intentions to implement its proposed service to Marlin. These matters are discussed below.

PAST AND PRESENT SERVICE TO MARLIN, TEX.

4. A brief statement of the history of Station KAWA will be helpful in understanding the matters discussed below. Station KAWA (formerly KMLW) was initially licensed as a Marlin, Texas station on April 29, 1953. By action of May 2, 1962, the Commission changed the station designation to Waco-Marlin, Texas. In taking that action, we believed that it was not in the public interest to limit the Class II 10 kw facility to Marlin, a city whose population at the time was 6,700. Waco, Texas had a population of 97,800 and was served by two other existing stations.

5. On November 23, 1964, KWTX filed a Petition to Deny the then pending application to assign the license of Station KAWA to Morbro, Inc. Petitioner alleged that Morbro did not intend to discharge its obligations to continue to serve Marlin, but rather intended to orient its service to Waco. After Morbro amended its application to clarify that it intended to serve the needs and interests of Marlin as well as Waco, the KWTX petition was withdrawn.

6. On July 14, 1965, KWTX petitioned to deny the then pending KAWA renewal application. In pertinent part, KWTX alleged that KAWA did not program to meet the broadcast needs of Marlin, Texas and that its renewal proposals failed to disclose that it would meet these needs in the future. In its opposition, KAWA clarified its past programming and future proposals. The Commission concluded that the petitioner had not shown that KAWA failed substantially to carry

[1] Petitioner's pleading entitled "Conditional Request For Waiver", filed on October 18, 1972, in which it asks for waiver for the filing time provisions of Section 1.580(i) is an unauthorized pleading under Section 1.45 of our Rules and will also be dismissed. In re *Zenith Radio Corp.* Memorandum Opinion and Order, FCC 72–1129 released December 21, 1972.

[2] The Commission received three letters, all dated June 30, 1972 protesting approval of the application. The correspondents were J. D. Houston, Edward Shivers and Larry Parsons. Subsequently Mr. Parsons withdrew his protest. We have also received several letters from other Marlin citizens praising the station and urging approval of the application.

out its proposed programming for Marlin as well as for Waco and that the petitioner failed to raise a material or substantial question of fact requiring a hearing on the renewal application. See *Morbro, Inc.*, 2 FCC 2d 483, 6 RR 2d 821 (1966). Now, six years and two license renewal grants later, Petitioner again alleges that assignor has failed to provide a program service to meet the needs of Marlin, Texas.

7. Our consideration of the substance of these allegations must be placed in the context of the application before us. It has been our long standing practice to rely on the periodic examination of the license renewal process to determine a licensee's right to continue operating and not to fully examine its past performance on assignment unless questions of a serious kind have been raised. *ABW Broadcasters, Inc.* 1 RR 2d 65, 69 (1963). Thus, we are not here considering whether the assignor's service to Marlin has been substandard, but the much more narrow question of whether Petitioner's allegations, in light of the applicants responses and other relevant factors, demonstrate an operation so seriously deficient that the institution of revocation proceedings is required.[3]

8. Here, Petitioner alleges that one week's monitoring in June 1972 when measured against representations made in the 1965 renewal application demonstrates that the assignee is not providing the service to Marlin it had promised. Petitioner would thus have us ignore the fact that in the interim we have twice reviewed the assignor's performance and proposals, the last in January of 1972, and found them sufficiently adequate to warrant the renewal of the station's license. This we do not propose to do, particularly here, where petitioner does not even allege that the results of its monitorings demonstrate that the assignor is not living up to the proposals made in its most recent license renewal application.[4]

9. Finally, we note that generally a single week's monitoring is insufficient to establish that a licensee has not been fulfilling its programming representations, especially where the licensee has demonstrated that it has had programming on the station which meets ascertained needs. See *Lakewood Broadcasting Services, Inc.* (Notice of Apparent Liability) FCC 72-276, adopted April 26, 1972. Here, in response to Petitioner's allegations, the assignor has set forth specific programs or program segments which it claims meet needs and interests of Marlin. Petitioner, in response, does not deny that these programs do meet needs of Marlin, but only contends that they are not programs of exclusive interest to the residents of that community. We hold that the licensee's response overcomes any adverse inference which the results of Petitioner's one week monitoring of Station KAWA might have raised.

10. In view of the foregoing, we conclude that Petitioner's allegations do not raise questions of such a serious nature as to pose a bar to our favorable consideration of this application.

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[3] Setting the subject assignment application for hearing on issues relating to the assignor's past performance would serve no purpose since it would in no way affect its authority to continue to operate these stations.

[4] KWTX does state that there was a lapse in broadcasting the Marlin Jaycee program. However, we do not believe that this temporary lapse is sufficient to warrant any action.

ASCERTAINMENT OF COMMUNITY NEEDS AND ASSIGNEE'S PROPOSED SERVICE TO MARLIN, TEX.

11. KWTX questions the Marlin portion of Centrum's ascertainment of community needs survey. It claims that the Marlin Negro and Spanish-American leaders are not representative of the demographic makeup of the community and that Centrum failed to indicate what problems the proposed public affairs programs would meet, as required by the Commission's *Primer on Ascertainment of Community Needs by Broadcast Applicants*. It argues that Centrum won't present Marlin oriented programs because the only mention of Marlin in assignee's proposed programs is with reference to the Marlin Junior Chamber of Commerce—the Jaycees Radio Day and a five minute per week Jaycee news program. KWTX also claims that the Centrum "formula" for adequate service to Waco and Marlin is ambiguous and phrased in such technical terms that it is not readily understood. It believes that the Commission "should not be fed ambiguous terms such as submitted by Centrum in its proposed public affairs programming." In addition, KWTX makes the allegation that while Centrum proposes programs and service allegedly designed to serve Marlin (e.g. public discussion programs and forums, local newscasts, local civic group leaders reports, management opinions) it will not provide the facilities to allow participation by Marlin residents. It argues that Centrum proposes no local studio for Marlin, no production staff living in Marlin no involvement in the day to day affairs of Marlin, and no programs that can be produced by or on behalf of the citizens of Marlin without the "undue restriction of having to drive fifty-six miles round trip to the KAWA studios."

12. In response Centrum states that the Petition to Deny totally ignored its July 14, 1972 amendment which answers the questions concerning the survey and commits it to maintain and improve the quality of service to Marlin, Texas.[5] A summary of the information in the application regarding Centrum's survey and proposed programming is set out in the appendix.

13. Regarding its formula for service to Waco and Marlin, Centrum states:

> These programs would be allocated between the cities of Waco and Marlin on a random basis proportional to the density of the public affairs activities existing within each community and resulting demands thereby for public service; consistent with the applicant's accepted responsibility to adequately serve and remain responsive to the needs of *both* Waco and Marlin communities.

14. In response to the KWTX allegation concerning the proposed Marlin facilities, Centrum states:

> At the present time, secondary studio space is maintained by KAWA at Bess's Flowers, 127 Railroad Street. Public access to Marlin residents is provided by local phone 936–2551 with an extension at 225 Palm Dr., residence of Mr. Joe Webb, Mrs. Webb, at 127 Railroad Street, is available to relay radio business from 8 a.m. to 5 p.m. daily. This studio via a direct line to the Fall Hotel, is linked via the Marti R F transmitter therein to the main studio at the main

[5] On this point, KWTX responds: ". . . it could not be expected that Petitioner would refer to the July 14 and 17, 1972, amendments in its Petition to Deny. As the supporting affidavit to the petition attests, the petition was prepared prior to July 14." As noted above, the petition was filed July 18, 1972 and the supporting affidavit is signed July 14, 1972.

transmitter location for live production of public affairs programming. Also, recording equipment located at this secondary studio site and portable recording equipment is utilized for the majority of present public affairs programming.

Further, a completely equipped remote studio trailer is available for mobile or remote broadcasts, also equipped with a Marti R F link to the main transmitter via rebroadcast on the downtown Marlin Marti unit or via local phone lines.

As the case with Waco, adequate production staff is available from the main studios for local public affairs production.

The applicant anticipates retaining Mr. Joe Webb, Marlin resident, presently functioning in a sales/newsman capacity, in like manner expending approximately 50% of his time and efforts in behalf of Marlin. In addition, the applicant has made tentative arrangements with Mr. Bruce Foster, identified within the proposed staff, Exhibit 13, as one of the two full-time staff salesman; who would be joining the applicant's staff. Mr. Foster would function in a combination salesman/newsman capacity, expending more than 50% of his time and efforts in behalf of Marlin and Falls County, and would relocate his family residence to the in or near Marlin rural area.[6]

In its Reply and Supplemental Petition to Deny, KWTX raises no new facts or issues; instead it restates its prior allegations that Centrum's proposal will not offer any meaningful local service to Marlin, Texas.

15. Upon careful review of all the information before us we conclude that Centrum's ascertainment of community needs is adequate. Its survey consisted of interviews with a broad cross-section of community leaders including those from ethnic and racial minorities. With regard to its programming proposals, we are of the view that the eight programs which are described in the appendix appear to be adequate to serve the special needs of the Marlin community. Centrum's proposed facilities for serving Marlin (e.g. the secondary studio space in Marlin, with a direct line hook-up to its main studio, a remote studio trailer, and the residency of two sales/newsmen employees in Marlin, one of which will relocate his residence to the Marlin area, who will devote 50% of their time to Marlin), indicate that assignee will be able to render the necessary service so as to enable KAWA to function as a local outlet for Marlin. With regard to the question of whether assignee will implement its proposals for service to Marlin, a hearing on such an issue would deprive assignee of the opportunity to demonstrate its good faith. See Memorandum Opinion and Order FCC 72–990 released on November 13, 1972, granting the application of Robert P. Adams for assignment of license of Station KUTE–FM, Glendale, California, appeal pending *sub nom Mount Wilson FM Broadcasters, Inc.* v. *F.C.C.*, U.S. Court of Appeals, D.C. Cir., Case No. 72.2068; *Brandywide-Main Line Radio, Inc.* 4 RR 2d 697, 700, 702 (1965). We wish to emphasize, however, that the Commission looks to

[6] To further improve the public service to Marlin, the applicant proposes to explore and take such of the following actions deemed economically feasible:

(1) Possible relocation of the secondary studio from Bess's Flower Shop or in lieu thereof, identification of such studio space by outside sign.

(2) Toll free local access to KAWA via telephone by either a direct Marlin-Waco line giving Marlin residents a local number ringing in the main studio or general office or in lieu thereof, phone patch equipment will be installed giving local Marlin residents direct access to main studio via the existing phone and Marti R F unit.

(3) Revision of telephone listing reflecting this ready access.

(4) Improve quality of Marlin secondary studio equipment, primarily updating present malfunctioning recording equipment.

(5) KAWA in advertising for employment, its public notice requirements, and local promotion of Marlin public affairs programming will utilize the Marlin Democrat, the local newspaper.

a licensee authorized to serve more than one city, town, political subdivision or community to, indeed, serve the local needs of each such place. Accordingly, the Commission will hold the licensee of Station KAWA responsible to serve the needs of Marlin and Waco, Texas and we will carefully scrutinize the assignee's performance in this regard at the time KAWA's next license renewal application is filed.

16. In view of the foregoing we conclude that no substantial and material question has been raised concerning assignor's service to the Marlin community. Assignee's survey of community needs was adequate to properly ascertain the needs of its service area. With regard to assignee's proposed programming we conclude that the programs as described in the appendix evidence a sensitivity to the special needs of Marlin and clearly show that assignee proposes to utilize KAWA as a local medium for Marlin which will render a special and distinct service to Marlin residents and aid in resolving the needs and problems of that community.[7] The facilities as proposed by assignee appear to be adequate to enable the station to meet its special obligations for service to Marlin. Accordingly, in view of all of the above we conclude that no substantial questions of fact are raised by the Petition or the complaints which would warrant an evidentiary hearing; that assignee is legally, financially and technically qualified; and that the public interest will be served by a grant of instant KAWA assignment application. Accordingly, IT IS ORDERED, That the Petition to Deny filed by KWTX Broadcasting Company IS DISMISSED and the above captioned application to assign the license of Station KAWA, Waco-Marlin, Texas, from Morbro, Inc. to the Centrum Corporation IS GRANTED.[8]

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Waco, Texas is the county seat of McLennan County. Waco had a total 1971 Census population of 95,326 of whom 75,923 are Caucasian, 18,955 Negro and 448 of other minority groups. Approximately 7,550 persons are Spanish-American. Marlin, Texas, the county seat of Falls County, had a 1970 Census population of 6,351 of whom 3,124 are Caucasian, 2,207 Negro and 16 of other minority groups. There are approximately 600 Spanish-Americans in Marlin. Centrum's principals interviewed 50 community leaders in Waco, 25 in Marlin and 17 in other communities served by KAWA. In addition, a random general public survey of 263 persons was conducted by assignee's principals or volunteer personnel under their supervision. Concerning the alleged deficiencies in its survey concerning the Marlin leaders, assignee states that of the 25 Marlin leaders interviewed four (16%) were Negro and one (4%) was Spanish-American (its total community leader survey had a breakdown of 72.3% Caucasian, 20.8% Negro and 6.9% Spanish-American). In addition, Centrum made a showing specifically relating the community problems with the proposed broadcast mat-

[7] We note that in its latest renewal application (BR–2806, filed May 3, 1971) Morbro proposed 8.0% News, 0.8% Public Affairs and 4.0% Other Programs exclusive of entertainment and sports. Assignee proposes a substantial increase in each category—9.9% News, 2.8% Public Affairs and 4.8% Other programs exclusive of entertainment and sports.

[8] In making this grant, we find no basis to re-examine our 1962 decision licensing KAWA to serve Waco and Marlin, Texas or to require Station KAWA to physically maintain what in effect would be a second main studio in Marlin, as requested by the Petitioner. KWTX's interpretation to the contrary, Section 73.30 of the Commission's Rules permit the main studio to be located at the transmitter site "whether or not the transmitter site is in the place where the station is located." KAWA's studio at the transmitter site therefore complies with our Rules.

ter as required by the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants.*

Some of the problems discovered by the survey are: (1) lack of youth opportunities, activities and a voice in community; (2) increasing crime, need for better law enforcement, increasing drug abuse; (3) lack of civic pride, care in community, knowledge of civic leaders functions, need for improvement in city facilities; (4) high unemployment, low wages, need to attract new industry. Centrum proposes the following programs to meet the problems discovered by its ascertainment of community needs survey:

Youth Forum—(Monday–Friday at 3:45 p.m., 3–5 minute duration)—community youth discuss subjects helpful and detrimental to youth development—also discussions about constructive activities in which area youth can participate—local high schools of both Waco and Marlin as well as local colleges will be solicited for participants—programs will probably be taped for later airing.

Management Opinion—(Monday–Friday, 7:05–6 a.m., 12:05–6 p.m., 5:05–6 p.m.)—station management to take position on various current public affairs topics, national or international issues, or general social issues—expect both affirmative and negative reactions to ensue—to result in deeper station involvement in community problems.

We the People—(Monday–Friday, 11:05 to 11:25 a.m.)—panel discussion and phone-in—enabling public to voice their opinion on specific issues—Marlin Chamber of Commerce Executive Director will participate.

Community Report—(Saturday at 10:30 a.m. and 2:30 p.m.—lasting 5 to 8 minutes)—report by civic leaders as to group's position, function, opinions and happenings—Fall County agent will participate.

Do You Know—(Monday–Saturday, six one minute programs; Sunday—three one minute programs)—potpourri of facts and information to bring an awareness of culture, service, and art to the public in an attempt to educate and inform.

Business Spotlight of the Week—(Sunday at 8:30—35 a.m. and 4:30—35 p.m.) spotlight of different local businesses or industry each week—personal interviews with business and industry leaders will be taped for later airing—Chairman of Marlin Industrial Commission and Chamber of Commerce (Ray Cole) will cooperate in execution of program.

Church of the Air—(Sunday 11:00 a.m.–12:00 p.m.)—in addition to regular religious programming (paid and sustaining) this program will offer the diversity needed in religious programming (indicated as a community need)—remote studio trailer will be used to feed program from various Waco and Marlin churches—also tape programs for later airing.

KAWA Bulletin Board—(Monday–Saturday—five one-minute programs daily at various times)—informs of civic group activities in the hope that general public apathy can be overcome (indicated as survey problem).

F.C.C. 72-1149

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
MOUNTAIN STATE RADIO & TV CORP., FORT COLLINS, COLO.
For Modification Of Condition On TV Construction Permit for Channel 22

DECEMBER 14, 1972.

MOUNTAIN STATE RADIO AND TV CORP.
P.O. Box 7,
Fort Collins, Colo. 80521

GENTLEMEN: This refers to your request filed October 27, 1972, for modification of the condition on the construction permit of commercial television broadcast station authorized to operate on channel 22, Fort Collins, Colorado. (Call letters not yet assigned.)

In support of your request, you state that since Mr. Lowell S. Levine has far more experience and know-how than do the other stockholders, his assistance is essential in constructing the station and in engaging in all of the activities necessary to putting the station on the air. Therefore, you request that the present condition be modified to authorize you to hire Mr. Levine to provide expert advice and assistance in making the station operational. Furthermore, you indicate that Mr. Levine's status would be strictly that of an employee or consultant and that he would be subject, at all times, to the orders of the officers and board members.

On the basis of your representations, the Commission hereby modifies the condition on the construction permit to provide as follows:

Lowell S. Levine shall resign as a member of Mountain State Radio and TV Corp.'s board of directors and refrain from voting his stock in that corporation until such time as the Commission affirmatively acts to dissolve these restrictions. Mr. Levine may be hired by Mountain State Radio and TV Corp. as an employee or consultant to assist in the construction and initial operation of the station, but he may not serve as an officer and his activities shall be subject at all times, to the approval of the station's officers and/or the board of directors. This condition is without prejudice to whatever action the Commission may deem appropriate as a result of the final decision in Docket No. 18852.

Commissioner Johnson dissenting. Commissioner H. Rex Lee dissenting and issuing a statement. Commissioner Wiley concurring in the result.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER H. REX LEE

On June 1, 1972, the Commission granted the application of Mountain State Radio and TV Corporation for a construction permit for a new commercial television broadcast station to operate on Channel 22 at Fort Collins, Colorado. The grant was made subject to the condition that one of the applicant's principals, Lowell S. Levine (director and 26% stockholder), would resign as a member of Mountain State's board of directors, would refrain from voting his stock in the corporation and would be effectively separated from participation in the affairs of the proposed Fort Collins station. The condition was imposed by the Commission because a question had been raised by the Broadcast Bureau with respect to Levine's truthfulness and candor in connection with his testimony in Docket No. 18852.[1] Mountain State consented to the imposition of such a condition on its Channel 22 construction permit. However, on October 27, 1972, the permittee requested modification of the condition so that it could retain Levine as an employee or consultant to assist in the construction and initial operation of the station, and the majority now honors the Mountain State request.

I simply cannot agree with the majority's position. The original condition on the Channel 22 grant was intended to prevent Levine from assuming a position of control in the operations of the proposed station in view of the question raised in the Fergus Falls proceeding about his candor. In this regard, it should be noted that the Administrative Law Judge, in an Initial Decision in Docket No. 18852, FCC 72D–70, released November 1, 1970, found that Levine had made untruthful statements, which alone would be sufficient to disqualify the Fergus Falls applicant. While Levine's experience may be of value in the activation of the Fort Collin's station and even though the modified condition provides that his activities will be subject to the approval of the permittee's board of directors, I would not permit his participation in the affairs of the proposed station. No matter what precautions the majority may take in its modification of the original condition, it seems clear to me that Levine, as a substantial stockholder of Mountain State, will be in a position to exercise effective control over the operation of the Fort Collins facility at a time when a serious question remains about his candor before the Commission.[2]

Therefore, I would not modify the condition on the Channel 22 construction permit as requested by Mountain State.

[1] Levine is also secretary-treasurer and 28% stockholder of Harvest Radio Corporation, an applicant for a construction permit for a new standard boadcast station at Fergus Falls, Minnesota. The Fergus Falls application was designated for hearing in Docket No. 18852 by Commission Order, FCC 70–477, released May 11, 1970.

[2] My position here should, in no way, be construed as a prejudgment of the Fergus Falls proceeding. However, it is based on the fact that very significant matters have been raised in that proceeding concerning a principal of the permittee here.

209–024—73——7

F.C.C. 73-63

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMENDMENT OF SECTIONS 73.93, 73.265, AND 73.565 OF THE COMMISSION'S RULES CONCERNING OPERATOR REQUIREMENTS FOR STANDARD (AM) AND FM BROADCAST STATIONS	Docket No. 18930 RM-1576 RM-1627

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 24, 1973)

BY THE COMMISSION:

1. The Commission has before it a petition, filed July 7, 1972, by the National Association of Broadcasters (NAB), requesting reconsideration and amendment of certain of the rules adopted pursuant to the Report and Order in the above-entitled proceeding, which was released on June 7, 1972 (FCC 72-467) and published in the Federal Register on June 8, 1972 (Volume 37, Number 111).

2. In particular, NAB takes exception to these rules in three respects: Each exception is separately set forth and discussed hereunder:

(1) Section 73.93(f)(5) establishes the technical requirements for the system employed to switch between directional, or between directional and nondirectional modes of operation when lesser grade operators perform this function. NAB objects to the requirement that:

> The switching equipment shall be so arranged that the failure of any relay in the directional antenna system to activate properly will cause the emissions of the station to terminate.

3. NAB argues that switching failure should not automatically result in a cessation of station operation, but, rather, that the consequences of the failure must be weighed against the licensee's obligation to continue to provide service to the public. It notes that previously, where station operation was only under the continuous surveillance of first class radiotelephone operators, the operator on duty would take immediate steps to correct the switching failure, and would shut the station down only in an instance in which on-air corrections could not be made feasibly, and the effects of continued operation with the radiation pattern not properly established were considered so serious as to require the station to cease operation forthwith. NAB cites the following example:

> A situation may readily be envisioned in which a single market [station] exists which utilizes a very elementary directional antenna system. The failure of a relay in the directional antenna switching system and the resulting termination of transmissions in such situations must be considered in the light of the public service to that community. We suggest that there are many situations, cir-

cumstances and conditions which dictate the continuation of service even though there may be a technical malfunction in the transmission system. It is the NAB position that the licensee should make the judgment in determining the severity and impact of the failure and take whatever steps are deemed necessary.

4. NAB's arguments appear to be predicated on the assumption that, at the time of a switching failure, personnel will be present at the station competent to decide upon and to take immediate action appropriate in the particular circumstances. This also was our intention, when, in the Notice of Proposed Rule Making in this matter, we proposed that while lesser grade operators might be permitted to perform routine duty assignments at stations with directional antennas, to require a first class radiotelephone operator to be on duty at the time when each station begins directional operation or changes directional patterns. This proposal was opposed generally as being impractical and burdensome, and it was abandoned. However, faced with an alternative in which operators without technical knowledge or training would be entrusted with the antenna switching function, we adopted § 73.93 (f) (5), to establish the conditions and safeguards which we considered necessary under such circumstances.

5. Because of the serious consequences which may result from improper switching of directional systems,[1] we believe that when such malfunctioning occurs and no one is present who is qualified to correct the condition, or to evaluate the seriousness of the malfunction, there is little alternative but to terminate operation. It is appropriate to note that, in such circumstances, even if facilities for automatic termination of operation were not required and provided. the lesser grade operator would be obligated to manually shut down the station, pursuant to the requirements of § 73.93(g) of the rules, which reads, in part:

> . . . The emissions of the station shall be terminated immediately whenever the transmitting system is observed operating beyond the posted parameters, or in any other manner inconsistent with the rules, and the above adjustments are ineffective in correcting the condition of improper operation, and a first class radiotelephone operator is not present.[2]

The incorporation of automatic circuitry in the system to achieve this result, however, relieves the lesser grade operator of a responsibility he may be loath to exercise.

6. In view of the above, we believe all of the requirements of § 73.93(f)(5) are necessary when antenna pattern switching is not supervised by a first class radiotelephone operator. Accordingly, we are unwilling to change these requirements.

(2) NAB believes that the partial proof of performance of the directional antenna, which a station employing lesser grade operators is required to make at yearly intervals (§ 73.93(e)(4)) is unnecessarily complicated and extensive from a technical standpoint, and the requirement imposes a hardship on some stations. It notes that when stations with directional antennas operate by remote control a yearly skeleton proof has been considered sufficient to verify the proper operation of

[1] Not only can a switching failure result in the production of serious interference to other stations, but the functioning of the transmitter may be severely disrupted.

[2] This rule has been carried forward, with some minor revision, from rules which for many years have governed the performance by lesser grade operators of duty assignments at aural broadcast stations.

the directional antenna, and it sees no reason why a more stringent requirement should be imposed when lesser grade duty operators are utilized. It suggests that Note 2 to Section 73.93(e)(4) be amended to specify the same number of measurements on each radial as is required for the skeleton proof for remotely controlled stations.

7. Both the partial proof and the skeleton proof, which NAB would specify in its stead, require that field strength measurements be made at locations which were utilized for such measurements in the previous complete proof of performance. However, the partial proof not only includes measurements at many more of these points than does the skeleton proof ("at least 10" on each radial, as contrasted with "at least three") but also requires a graphical analysis of the measurements, pursuant to procedures prescribed in § 73.186 of the rules. An analysis of this nature determines the inverse field from the directional antenna in the direction of each radial, and permits verification that the radiation from the antenna in each direction approximates that established by the original proof. No such analysis is required in a skeleton proof, and, indeed, no meaningful analysis could be made with the limited measurement data which a skeleton proof makes available. Thus, while the partial proof can be expected to reveal any substantial distortion of the originally established radiation pattern, the skeleton proof serves little purpose other than to establish that the monitoring points specified in the station's authorization have not been degraded by changes in their immediate environment (certainly an important function, but one which does not permit a definitive evaluation of radiation pattern characteristics).

8. There are many cases in which there has been no occasion for the station licensee to reestablish the performance of his directional antenna subsequent to the original authorization. In some instances, many years have elapsed since this has been done. On the other hand, there are a number of factors which may adversely affect antenna performance, including the deterioration of antenna components with time, and the erection or modification of nearby structures which alter the environment in which the antenna operates.

9. We believe that if an operator with little technical training is to be entrusted with the day to day surveillance of a directional station, it should be only under circumstances where any deficiencies or anomalies in its operation have been brought under control. Thus, we adhere to the view that when a licensee engages to use such operators, a partial proof is necessary, and should subsequently be repeated periodically.

10. However, we recognize that the procurement of the many measurements required in such a proof may be arduous and time consuming, and the analysis of these measurements is a specialized procedure for which the licensee may need to engage the services of a consulting engineer—a substantial expense. Thus, we should not require the execution of a partial proof any more often than we consider vitally necessary to insure the continued satisfactory performance of the directional antenna.

11. In the light of these considerations, we are amending present Section 73.93(e)(4) [3] so as to require that a partial proof be made

[3] This appears as § 73.93(e)(3) in the amended rules.

every three years, the first of these proofs to be completed within one year of the date the engineer-in-charge is notified of the appointment of a chief operator (see § 73.93(h)), with skeleton proofs to be performed in each of the intervening years. We have added a new Note 3 at the end of Section 73.93, defining the skeleton proof. We have also somewhat revised the wording of Note 2, describing a partial proof, in the interest of specificity.

(3) NAB seeks amendment of § 73.92(h)(3) (the standard broadcast rule) and § 73.265(d)(4) (the FM broadcast rule), which require the separate designation of an acting chief operator each time the designated chief operator is temporarily absent. (Section 73.565(d)(4) is the corresponding provision of the noncommercial educational FM broadcast rules, and, while not cited by NAB, presumably would be subject to the changes which NAB suggests.) NAB notes that while many licensees may wish to follow the course of action prescribed by this rule, others, who have more than one first class operator in regular employment, would prefer, if the rules so permitted, to designate, on a permanent basis, an assistant chief operator, who would automatically become acting chief operator during absences of the chief operator. NAB points out that the designation of an acting chief operator would obviate the necessity for notifying the Commission concerning each absence of the chief operator, and reduce the burdens imposed by the present rule, both on the Commission and the licensee.

12. We agree that this option should be made available to broadcast station licensees, and are adopting appropriate amendments to the rules for this purpose. The basic changes to accomplish this, however, have been made in §§ 73.93(h), 78.265(d)(1), and 73.565(d)(1), the rules governing the designation of the chief operator, rather than in the rules specifically cited by NAB.

13. In the above paragraphs we have disposed of the specific requests made by NAB for reconsideration of certain of the rules adopted as a result of the proceeding in Docket 18930. Insofar as NAB further requests expedited action in Docket 18471 and 18455, which, it points out, concern matters which are interrelated, to some extent, with the subject matter of Docket 18930, this request is moot. Appropriate Orders were adopted in Dockets 18471 and 18455 on January 10, 1973.

14. In the light of action taken in these proceedings, we find that certain amendments to Section 73.93 should be made. Furthermore, our initial experience with the application of the amended radio operator rules, and informal comments and questions we have received, indicate that other minor amendments are desirable. We will, therefore, on our own motion, take this opportunity to deal with these matters. The nature of the changes we are making is not such as to require prior notice and comment prior to their adoption. These rule changes are discussed in the following paragraphs.

15. *Section 73.93(b), 73.265(b), 73.565(b).* These rules, for the standard, FM, and noncommercial educational FM broadcast services, respectively, are similar in purpose, and are intended to preclude lesser grade operators from attempting technical procedures beyond their competence. Accordingly, each of the cited rules requires specified technical duties to be performed by a first class radiotele-

phone operator. An unintended result of the rules, as drafted, would be to preclude professional consulting engineers who do not hold operator licenses of the requisite grade from performing those engineering services for broadcast stations for which they customarily have been retained by station licensees. Accordingly, we are amending §§ 73.93(b) and 73.265(b) by the addition of the following:

> . . . or, during periods of operation when a first class radiotelephone operator is in charge of the transmitter, by or under the direction of a broadcast consultant regularly engaged in the practice of broadcast station engineering.

An amendment having the same effect is also made to Section 73.565(b).

16. *Sections 73.93(c), 73.265(c), 73.565(c).* These similar rules are intended to specify the basic operator requirements for stations without directional antennas (standard broadcast only) and within specified power ceilings, which, even under previous rules, have been permitted to employ lesser grade duty operators. However, while the first class operator requirements are spelled out in the rules (second class operators are specified for certain categories of non-commercial educational FM stations), we inadvertently neglected to specify any requirement for lesser grade duty operators. Amendments to the above listed rules for the purpose of correcting this omission are adopted herein.

17. *Section 73.93(e)(3).* This rule, which requires a first class radiotelephone operator to observe the base currents and certain other parameters of a directional antenna system five days each week, and to enter the results of these observations in the maintenance log, is being deleted in toto. Its presence in the operator rules perhaps has generated more misunderstandings and inquiries than any other provision of these rules, because it presents inconsistencies, both apparent and real, with the logging requirements of Section 73.113 and 73.114, and with conditions contained in the instruments of authorization of individual stations. This problem was before us when we amended the rules pursuant to decisions reached in the Report and Order in Docket 18455. While that proceeding primarily is concerned with the inspection and logging requirements for stations with directional antennas operated by remote control, the rules as adopted therein involved extensive revision of Section 73.113 (Operating Log) and Section 73.114 (Maintenance Log). When this revision was undertaken, the need to resolve the above-mentioned problem was kept in mind. In consequence, the substance of § 73.93(e)(3) has been incorporated in Section 73.114 and made applicable to all stations with directional antennas which are not operated by remote control. Specifically, the once a day, five days a week schedule for the observations and log entries specified in § 73.93(e)(3) is established for all such stations, regardless of any provision in a station's instrument of authorization requiring more frequent action. Since this is the case, it is appropriate to delete the substance of § 73.93(e)(3) from the operator rules at this time.

18. The rule amendments adopted in Docket 18471 specify a schedule pursuant to which the various categories of stations with directional antennas will be required to install type approved antenna monitors. Note 1 in Section 73.93 has been amended to specify an

effective date for the implementation of (e)(2) consistent with that schedule.

19. We are continuing actively to pursue our examination of the regulations governing radio and television broadcasting, a project initiated pursuant to our Public Notice of April 6, 1972. As we study this matter further, and as more experience is gained in the application of the radio operator rules, as now amended, some additional modification and mitigation of those requirements of the rules intended to insure satisfactory station functioning with lesser grade operators may appear feasible. Under such circumstances, we will, on our own motion, take appropriate action.

20. The petition for reconsideration by the National Association of Broadcasters IS GRANTED to the extent discussed above, and as reflected in rule amendments which we now adopt. In all other respects IT IS DENIED.

21. In view of the foregoing, and pursuant to authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, IT IS ORDERED, That, effective April 27, 1973, Sections 73.93, 73.265, and 73.565 of the Commission's Rules and Regulations ARE AMENDED as set forth in the Attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

APPENDIX

1. In Section 73.93, paragraphs (b), (c), (e)(3), (4), and (5) and (h), and the Notes at the end of this section are amended to read as follows:

§ 73.93 Operator requirements.

* * * * * * *

(b) With the exceptions set forth in paragraph (f) of this section, adjustments of the transmitting system, and inspection, maintenance, required equipment performance measurements, and required field strength measurements shall be performed only by a first class radiotelephone operator, or, during periods of operation when a first class radiotelephone operator is in charge of the transmitter, by or under the direction of a broadcast consultant regularly engaged in the practice of broadcast station engineering.

(c) A station using a non-directional antenna with nominal power of 10 kilowatts or less may employ first class operators, second class operators, or operators with third class permits endorsed for broadcast station operation for routine operation of the transmitting system if the station has at least one first class radiotelephone operator readily available at all times. This operator may be in full time employment, or as an alternative, the licensee may contract in writing for the services, on a part-time basis, of one or more such operators. Signed contracts with part-time operators shall be kept in the files of the station and shall be made available for inspection upon request by an authorized representative of this Commission.

* * * * * * *

(e) * * *

* * * * * * *

(3) [*Delete* all text under subparagraph (3)]

(4) [Renumber as (3) and revise text as follows:] Within one year of the date on which the Commission is notified, pursuant to § 73.93(h), of the designation of a chief operator, the station shall complete a partial proof of performance, as defined in Note 2 at the end of this section, and shall complete subsequent partial proofs of performance at three year intervals thereafter. A skeleton proof of performance, as defined in Note 3 at the end of this section, shall be

completed during each year that a partial proof of performance is not required. Not less than ten, nor more than fourteen months shall elapse between the completion dates of successive proofs of performance. The results of such proofs shall be prepared and filed as specified in paragraph (b) of Section 73.47.

(5) [Renumber as (4)]

* * * * * * *

(h) When lesser grade operators are used, in accordance with paragraph (d) or (e) of this section, for any period of operation with nominal power in excess of 10 kilowatts, or with a directional radiation pattern, the station licensee shall designate one first class radiotelephone operator in full-time employment as the chief operator who, together with the licensee, shall be responsible for the technical operation of the station. The licensee also may designate another first class radiotelephone operator as assistant chief operator, who shall assume all responsibilities of the chief operator during periods of his absence. The station licensee shall notify the engineer in charge of the radio district in which the station is located of the the name(s) and license number(s) of the operator(s) so designated. Such notification shall be made within three days of the date of such designation. A copy of the notification shall be posted with the license(s) of the designated operator(s).

* * * * * * *

(3) At such time as the regularly designated chief operator is unavailable or unable to act as chief operator (e.g., vacations, sickness), and an assistant chief operator has not been designated, or, if designated, for any reason is unable to assume the duties of chief operator, the licensee shall designate another first class radiotelephone operator as acting chief operator on a temporary basis. Within three days of the date such action is taken, the engineer in charge of the radio district in which the station is located shall be notified by the licensee by letter of the name and license number of the acting chief operator, and shall be notified by letter, again within three days of the date when the regularly designated chief operator returns to duty.

* * * * * * *

NOTE 1: The effectiveness of subparagraph (2) of paragraph (e) is suspended until June 1, 1974.

NOTE 2: The partial proof of performance shall consist of at least 10 field strength measurements on each of the radials established in the latest complete adjustment of the directional antenna system. These measurements shall be made at locations, all within 2 to 10 miles from the antenna, which were utilized in such adjustment, and include on each radial, the point, if any, designated as a monitoring point in the station authorization. Measurements shall be analyzed in the manner prescribed in Section 73.186 of the rules of this part.

NOTE 3: The skeleton proof of performance shall consist of field strength measurements, at least three on each of the radials established in the latest complete adjustment of the directional antenna system, made at measurement locations utilized in such adjustment, and include, on each radial, the point, if any, designated as a monitoring point in the station authorization.

2. In Section 73.265, paragraphs (b), (c), and (d) are amended to read as follows:

§ 73.265 Operator requirements.

* * * * * * *

(b) With the exceptions set forth in paragraph (e) of this section, adjustments of the transmitting system, and inspection, maintenance, and required equipment performance measurements shall be performed only by a first class radiotelephone operator, or, during periods of operation when a first class radiotelephone operator is in charge of the transmitter, by, or under the direction of a broadcast consultant who is regularly engaged in the practice of broadcast station engineering.

(c) A station with authorized transmitter output power of 25 kilowatts or less may employ first class operators, second class operators, or operators with third class permits endorsed for broadcast station operation for routine operation of the transmitting system if the station has at least one first class radiotelephone operator readily available at all times. This operator may be in full

time employment, or, as an alternative, the licensee may contract in writing for the services, on a part-time basis, of one or more such operators. Signed contracts with part-time operators shall be kept in the files of the station and shall be made available for inspection upon request by an authorized representative of the Commission.

(d) * * *

(1) The station licensee shall designate one first class radiotelephone operator in full time employment as the chief operator who, together with the licensee, shall be responsible for the technical operation of the station. The licensee may also designate another first class radiotelephone operator as assistant chief operator, who shall assume all responsibilities of the chief operator during periods of his absense. The station licensee shall notify the engineer in charge of the radio district in which the station is located of the name(s) and license number(s) of the operator(s) so designated. Such notification shall be made within three days of the date of such designation. A copy of the notification shall be posted with the license(s) of the designated operator(s).

* * * * * * *

(4) At such times as the regularly designated chief operator is unavailable or unable to act as chief operator (e.g., vacations, sickness), and an assistant chief operator has not been designated, or, if designated, for any reason is unable to assume the duties of chief operator, the licensee shall designate another first class radiotelephone operator as acting chief operator on a temporary basis. Within three days of the date such action is taken, the engineer in charge of the radio district in which the station is located shall be notified by the licensee by letter of the name and license number of the acting chief operator, and shall be notified by letter, again within three days of the date when the regularly designated chief operator returns to duty.

* * * * * * *

3. In Section 73.565, paragraphs (b), (c), and (d) are amended to read as follows:

§ 73.565 Operator requirements.

* * * * * * *

(b) With the exceptions set forth in paragraph (e) of this section, adjustments of the transmitting system, and inspection, maintenance, and required equipment performance measurements shall be performed only by an operator holding the class of license specified below, or during periods of operation when the transmitter is in the charge of an operator of the specified class, by or under the direction of a broadcast consultant regularly engaged in the practice of broadcast station engineering.

* * * * * * *

(c) A noncommercial educational FM station with authorized transmitter output power not in excess of 25 kilowatts may employ first class operators, second class operators or operators with third class permits endorsed for broadcast station operation, for the routine operation of the transmitting system, if the station has at least one operator of a class specified for the station's power category in (b) above, readily available at all times. This operator may be in full time employment, or, as an alternative, the licensee may contract in writing for the services, on a part-time basis, of one or more such operators. Signed contracts with part-time operators shall be kept in the files of the station and shall be made available for inspection upon request by an authorized representative of the Commission.

(d) * * *

(1) The station licensee shall designate one first class radiotelephone operator in full-time employment as the chief operator who, together with the licensee, shall be responsible for the technical operation of the station. The licensee may also designate another first class radiotelephone operator as assistant chief operator, who shall assume all responsibilities of the chief operator during periods of his absence. The station licensee shall notify the engineer in charge of the radio district in which the station is located of the name(s) and license number(s) of the operator(s) so designated. Such notification shall be made

within three days of the date of such designation. A copy of the notification shall be posted with the license(s) of the designated operator(s).

* * * * * * *

(4) At such times as the regularly designated chief operator is unavailable or unable to act as chief operator (e.g., vacations, sickness), and an assistant chief operator has not been designated, or, if designated, for any reason is unable to assume the duties of chief operator, the licensee shall designate another first class radiotelephone operator as acting chief operator on a temporary basis. Within three days of the date such action is taken, the engineer in charge of the radio district in which the station is located shall be notified by the licensee by letter of the name and license number of the acting chief operator, and shall be notified by letter, again within three days of the date when the regularly designated chief operator returns to duty.

* * * * * * *

F.C.C. 72-985

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
PETITION OF TIME LIFE FILMS FOR WAIVER OF THE "OFF-NETWORK" RESTRICTIONS OF THE PRIME TIME ACCESS RULE FOR "SIX WIVES OF HENRY VIII" PROGRAM SERIES (PETITION FOR RECONSIDERATION FILED BY WESTINGHOUSE BROADCASTING CO., INC.)

MEMORANDUM OPINION AND ORDER

(Adopted November 8, 1972; Released November 9, 1972)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE DISSENTING; COMMISSIONER JOHNSON CONCURRING IN PART AND DISSENTING IN PART; COMMISSIONER HOOKS NOT PARTICIPATING.

1. The Commission here considers a timely "Petition for Reconsideration" filed by Westinghouse Broadcasting Company, Inc. (Westinghouse), seeking reversal of our decision of June 28, 1972, granting waiver of the "off-network" restrictions of the prime time access rule (Section 73.658(k)(3)), with respect to the six-program series, "Six Wives of Henry VIII" (released July 7, 1972, 35 FCC 2d 733 24 R.R. 2d 948). This decision granted the waiver request by Time Life Films (Time-Life), the owner and distributor of the program, and permits stations in the "top 50 markets" to present this film during prime time without limitation, despite the provisions of the section cited. We also consider here an opposition to the petition filed by Time-Life, and a reply to opposition by Westinghouse.[1]

2. The Westinghouse petition is organized on the basis of four main lines of argument. These, along with Time-Life's response, are discussed in the next few paragraphs: in summary, Westinghouse's contentions are as follows:

(1) Time-Life was not a proper party to seek or be granted a waiver;

(2) the waiver was inconsistent with the basic principle of the rule;

(3) the basis of this decision granting waiver was inconsistent with other decisions on the same subject, which are themselves inconsistent both with the policy underlying the rule and with each other;

(4) under the circumstances here, the *ex parte* handling of the waiver request was so arbitrary and capricious that it denies procedural due process to parties who, like Westinghouse, are directly affected by such rulings and have no notice of the requests leading to them.

[1] One of Westinghouse's chief concerns is what it alleges to be the uncertainty and discouraging effect on potential producers of this and other Commission actions and statements. Accordingly, it seeks reversal of our decision, and also that we "issue a clear statement of policy that similar requests will not be entertained in the future."

ARGUMENTS IN THE PLEADINGS

3. *Standing.* The first line of argument, concerning standing, was raised by both of the parties and in our judgment must be denied in both respects, and does not require extended discussion. As to Time-Life, it appears reasonably apparent that waiver of a Commission rule may be sought by the producer or supplier of a product whose use by stations—and therefore whose potential market—is substantially restricted by the rule. The situation in this respect is like that of manufacturers of communications equipment, whose market is often affected by the provisions of our rules, and who are often vigorous participants in matters of this type, both rule-making concerning such rules and requests for waivers of them. Time-Life's standing thus is clear. As to the standing of Westinghouse to oppose the waiver or seek reconsideration, the matter is perhaps slightly less obvious, possibly depending on whether Westinghouse, as a producer and distributor of first-run syndicated programs, is, actually or potentially, in competition with the material which Time-Life seeks to sell to stations under the waiver. No specifics are given, but, we assume for present purposes that such an actual or potential competitive relationship does exist, and that Westinghouse also is properly a party to this matter.[2]

4. *The alleged inconsistency of the decision with the policy underlying the rule.* Westinghouse urges that the waiver grant is inconsistent with the purpose of the rule, to promote independent, non-network sources of *new material.* The petition quotes various statements in the May 1970 Report and Order adopting the rule, to the effect that the objective is to "provide opportunity—now lacking in television—for the competitive development of alternate sources of television programming so that television licensees can exercise something more than a nominal choice in selecting the programs which they present . . .": and that, given the essentiality of program diversity and of diverse and antagonistic program sources to enable the licensee to serve the public, the rule represented the best way to achieve the requisite industry structure—"that system which will most stimulate and liberate those who create and produce television programs and those who purvey them to the public." (Report and Order in Docket 12782, pars. 25, 37).[3] It is also asserted that the decision conflicts with certain statements in the Report and Order as to what the rule was *not* intended to do—"carve out a competition-free haven for syndicators" or "smooth the path for existing syndicators or promote the production of any particular type of program . . ." (pars. 25, 26). In the latter connection, Westinghouse claims that we are, in effect, smoothing the path for existing syndicators, and granting waiver for this program as a "distinctive and meritorious" one, thus favoring this type of presentation. It is also urged that, while the minimal amount of network involvement or control of this material was one ground for waiver in this and other cases, this is not by any means a complete answer, since there is still present "involvement resulting

[2] We need not decide whether Westinghouse would have any standing on the other ground it urges: as a broadcaster whose stations are subject to the rule.
[3] See 23 FCC 2d 382, 397, 400; 18 R.R. 2d 1825, 1845–46, 1848 (May 1970).

in dictation by the three national networks of what programs are seen on American stations" and that "The kind of intimacy between network and independent producer which is invited by the waiver here is hardly within the ambit of the Commission's intent." (No specifics are advanced in support of this characterization). Westinghouse also urges that "independent production" is not furthered by waiver here, since Time-Life had nothing to do with the program's production.

5. In answer to these arguments, Time-Life asserts that essentially Westinghouse is taking a position against *any* waiver of the "off-network" provisions of the rule, whereas in fact the Commission has a duty to evaluate each waiver request on its merits and decide whether the public interest would be served better by waiver than by strict adherence to the rule (citing *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) and *WAIT Radio* v. *F.C.C.* 418 F. 2d 1153 (1969)). It is asserted that the facts here clearly support the Commission's conclusion, taking into account such factors as the origin of the program independent of any network involvement (and the importance of encouraging independent program sources), the significance of the program, the difficulty in presenting a 90-minute program to a large evening family audience without impinging on prime time, and the very limited impingement from a six-program series on the availability of prime time for *new* material. In short, "good cause" for the waiver was well-established.

6. *The alleged inconsistency of this and other 1972 decisions concerning waivers, both with the policy underlying the rule and with each other.* Westinghouse devotes nearly half of its petition, or some 11 pages, to this line of argument, dealing particularly with the four 1972 decisions concerning the "off-network" restrictions (*Wild Kingdom, Lassie, Six Wives of Henry VIII* and *National Geographic*) plus the decision denying waiver to ABC for *Summer Olympic* coverage.[4] To summarize this material rather briefly since not all of it pertains to this particular decision,[5] Westinghouse's thesis essentially is that the Commission really decides these cases on what it thinks of the program's *quality* or *merit*—"distinctive and meritorious character"—a criterion asserted to be subjective and unpredicatable as well as illegal and unconstitutional. It is claimed that the other tests mentioned in the various decisions are then applied arbitrarily and capriciously, in whatever way will support the basic judgment already reached.

7. Thus, it is said, *Wild Kingdom* and *Lassie* decisions drew a "factual-fictional" distinction, but this was ignored in grant of the present waiver (fictional), and denial in the cases of *Summer Olympics* and

[4] The citations to these five decisions are: *Mutual Insurance Co. of Omaha* (Wild Kingdom), 33 FCC 2d 583, 23 R.R. 2d 736; *Campbell Soup Co.* (Lassie), 35 FCC 2d 758, 24 R.R. 2d 856; *Time-Life Films* (Six Wives of Henry VIII), 35 FCC 2d 773, 24 R.R. 2d 849; *Storer Broadcasting Co.* (National Geographic), 35 FCC 2d 889, 24 R.R. 2d 868; and *American Broadcasting Companies, Inc.*, 35 FCC 2d 320 and 765, 24 R.R. 2d 628 and 862. Reconsideration was sought of the National Geographic decision. We have today granted it and waiver, with respect to three Storer stations and two others.

[5] We do not discuss here certain points urged by Westinghouse which are clearly erroneous, for example the assertion that by implication we accepted Time-Life's characterization of its program and mistakenly regarded it as "factual"—which has no support in the decision. See footnote 7 below, and the conclusions herein, as to the significance of the Summer Olympics' decision in this analysis.

National Geographic (factual). As to the addition of new material, this was emphasized in *Wild Kingdom* but ignored in *Lassie* and here, and of course with the *Olympics*, which is entirely new; similarly as to the extent of previous exposure, which we noted in the present *Six Wives* matter while ignoring the fact that the Lassie episodes involved might have been shown on the network many years before. Program popularity was noted in some of these cases, but was not mentioned in denial of the *Olympics* waiver, probably much the most popular of all. The small number of episodes involved here (six) was one of the chief grounds for waiver; but *Wild Kingdom* was granted though it involved a year's programming, and ABC Olympics was denied even though it involved only two weeks.[6] As to the length of time of each program, it is claimed that this was a factor here in support of waiver—the difficulty in presenting an evening 90-minute program without intruding into the cleared portion of prime time—whereas in *National Geographic* the one-hour length was held adverse, since it means more impingement on the availability of prime time to new material. As to the "first come, first served" concept noted in *Lassie* and to some extent *National Geographic*, it is asserted that this is patently reversible error.

8. It is claimed that the whole group of decisions cited reflect the complete absence of "a proper and rigorous analysis of the actual need for a waiver and the effect of it on the general rule". Indeed, it is said that the only one of the five cases possibly warranting grant, if such analysis had been applied, was *ABC Olympics* (this is said to be true because of that program's obvious uniqueness apart from subjective distinctions, the fact that waiver was absolutely necessary to present the 3½ hours at all (unlike the other cases), and that the material was completely new.[7] In sum, it is argued, the whole subject well deserves the "floating crap game" characterization in Chairman Burch's dissent (although Westinghouse disagrees with his position that this flows from the rule's inherent weakness); and the chaos involved makes independent program production a "house of cards which the very entities the Commission intends to encourage are understandably afraid to enter least it come down about their ears."

9. Time-Life does not deal at length with this part of Westinghouse's petition, simply pointing out that while there may have been some of the same factors in two or more of the decisions, none contained all of the facts supporting Time-Life's request, which the Commission carefully considered on the individual basis which is required in

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[6] Westinghouse claims that waiver to *Six Wives* was granted in ignorance of the full extent of impact on the rule, without knowing whether ultimately it would involve "two or two thousand stations or one or one thousand years."

[7] The emphasis on the ABC Olympics decisions ignores any difference between network and "off-network" impingement into the cleared portion of prime time; indeed, it is asserted that "showing off-network programs during prime time no more achieves the objectives of the Prime Time Access Rule than the broadcast of current network programs." As Time-Life points out in its opposition, Westinghouse has not always so completely equated the two subjects. In opposition to various petitions for reconsideration of the decision adopting the rule (July 1970), Westinghouse of course vigorously supported the rule generally, and opposed reconsideration. However, as to the off-network restriction adopted, Westinghouse stated that "it does not consider such prohibitions absolutely essential to the success of the rule." As alternatives to the rule adopted, which barred "off-network syndicated series programs", Westinghouse suggested either a policy statement that the Commission expects stations to fill the "cleared" time with new programs to the extent possible, or applying this restriction only to the portion of prime time which would actually represent a curtailment of network programming (one-half hour except one hour on Sundays).

waiver matters, and reached a reasoned decision that, on balance waiver would be in the public interest. The WOKO decision (*F.C.C.* v. *WOKO, Inc.*, 329 U.S. 223 (1946)) is cited for the proposition that the Commission need not "deal with all cases at all times as it has dealt with some that seem comparable."

10. *The question of notice.* Westinghouse, while admitting that not every request for waiver of a Commission rule either could or must be made available for comment by interested parties before it is acted upon, asserts that waiver requests of the sort involved here must be the subject of public notice and opportunity for comment, before they can validly be granted. Otherwise, it is claimed, there is denial of procedural due process to affected parties. In part, Westinghouse's argument is based on the identity of the party seeking and getting the waiver (discussed above); otherwise, it is claimed that here (unlike the usual waiver request situation) the facts were not by any means entirely within the knowledge of either the Commission or the petitioner; indeed, no party directly subject to the rule—a station licensee—had sought waiver or indicated that it was necessary or appropriate. The Commission was not in a position to make an informed judgment on a unilateral basis. Thus, it is said, the reasons supporting the usual *ex parte* handling of waiver requests do not apply, and to so handle them is a denial of due process to affected parties, such as Westinghouse here. It is claimed that this deficiency has been compounded in this situation by the treatment of earlier cases—often inconsistent and all without input by affected parties—which have created a confused situation, "making a travesty of a rule with years of earnest Commission and industry effort behind it." The late release of some of the decisions is also said to contribute to the problem.[8] In sum, it is said that the Commission "through unilateral waivers such as the one under consideration here, has acted in a manner which can only weaken the rule and serve to destroy its effectiveness." The Commission is asked to clarify the situation, and affirm the rule, by rescinding the waiver.

11. Time-Life, in opposing the Westinghouse contention, notes the absence of any citation of authority for the proposition that notice and opportunity for comment is required in connection with requests for waiver of a rule, and states that what Westinghouse would in effect require in these cases is another rule-making proceeding—inconsistent with the basic nature of a waiver request (which requires evaluation of individual situations vis-a-vis the general standard and policy), and often incompatible with the need for prompt decision on it. It also asserts that, if Westinghouse were really serious about its objection, it could at once have sought reconsideration and stay, following public notice of the action (here June 30, 1972), but did not do so, filing its petition for reconsideration only in August and without requesting a stay.

[8] We point out that, while the release of the text of some of these actions was unusually delayed (for the preparation of dissenting statements), public notice of the substance of the decision was given, in all cases, very shortly after the action, in accordance with the Commission's regular procedure.

DISCUSSION AND CONCLUSIONS

12. It is apparent from the foregoing recital of Westinghouse's arguments that its petition is only in part directed to the particular decision involved—grant of waiver for the *Six Wives of Henry VIII* program—and is partly a general statement of position. In the first connection, we are of the view that denial is clearly required under the circumstances of this particular case. We emphasize, also, that we have considered this matter, at this time, as if it were before us *de novo*.

13. Essentially, the reasons why grant of the waiver for *Six Wives of Henry VIII* was, and is, indicated are those set forth in the Memorandum Opinion and Order. The most important consideration is the limited extent of impact on the amount of "cleared" prime time which is involved in a six-program series, as opposed to a year-long program series such as the others we have had occasion to consider. Even assuming the maximum amount of impingement which appears possible—exposure in all 50 markets (Time-Life had sold in 30 as of mid-August), presentation by affiliated stations rather than independents (not necessarily true since there are independents in many of these markets), and presentation of all six episodes twice during a year to the extent of an hour in prime time—the waiver would affect only 600 hours, or slightly over 1% of 55,000 hours of "cleared" prime time involved annually.[9] Perhaps more important, as the decision pointed out, this is not the sort of material that a station could use to fill a time slot for the entire year and thus avoid having to purchase a program series of new material.[10] In this respect, of course, the case differs from the three other "off-network" decision situations. It is also to be noted, however, that it shares with the others one characteristic which we regard as important though Westinghouse apparently does not: the complete or nearly complete absence of any network control over the origin and production of the program, or any network interest in it beyond the right to network exhibition.

14. The decision also characterized the *Six Wives* material as "distinctive and meritorious", and, as indicated above, Westinghouse takes us to task for considering, apparently for mentioning, such matters. Without here getting into all of the ramifications of these concepts and arguments, we conclude (as we did before) that applied to this material, in the context of very limited impact on the availability of prime time, these terms have objective validity for decisional purposes. Whether we would have treated similarly *any* off-network series of six programs or less (with similar absence of network control or interest), we do not now decide. It is simply that, taking these and all the other circumstances mentioned into account, waiver is warranted in this case. In reaching this decision, both now and before, we have

[9] Seven hours a week, 52 weeks a year, on 152 affiliated stations in the top 50 markets (in two markets, one of the networks has two affiliates). Over-all, it appears that about 22% of the 55,000 hours is used for news broadcasts (local or network). Excluding this, the remaining "cleared" prime time is about 42,500 hours, of which the 600 hours mentioned would be about 1.4%.

The impact is limited to one hour per night even though the program runs 90 minutes, since this is all of the "cleared" time provided by the rule. The other half-hour comes either outside of prime time or at the expense of network programs during prime time.

[10] In this respect, the situation might be different if we had granted waiver in a number of these short-series situations, so that a station could, conceivably, combine them to fill up a time slot for an entire year. This, of course, is not the case.

taken into account the difference of the material from the general run of network and non-network programs, and the small amount of network exposure the program has had—six episodes run on the network once—so that it represents a contribution to program diversity.

15. The Prime Time Access Rule is an important regulation, and waivers of it are not to be granted lightly, either of the network or "off-network" restrictions. We recognize that, conceivably, there could be other factors involved even with a short program series, which should be weighed if they are present, for example, the possible impact on a producer interested in preparing a short series of similar character, such as English historical matters. But neither Westinghouse nor anyone else has shown us such impact, and therefore after careful consideration, we conclude again that waiver is well warranted. However, as discussed below, we also believe that for the immediate future a tighter policy is appropriate with respect to any further requests.

16. We need not dwell at length on Westinghouse's long but somewhat misleading arguments as to inconsistencies. As Time-Life points out, every waiver situation is likely to involve somewhat different sets of facts, some the same as earlier cases (although usually not all of the facts of any one case) and some new. Therefore the discussion is likely to cover different matters. Here, there is one notable difference from the three earlier "off-network" cases, the small number of episodes involved, as discussed above. This means that some of the concepts and distinctions set forth earlier, such as "fact versus fiction", and the cumulative impact from a series of waivers on the amount of "cleared" prime time, become less pertinent.

17. Westinghouse's emphasis on the ABC *Summer Olympics* decision in its analysis, indicated above, is not well taken, ignoring as it does the difference between network and "off-network" material. Without here belaboring the point, it is apparent that with respect to "off-network" material such as that involved here, as with any other non-network program, decisions to carry it represent the licensees' exercise of "something more than a nominal choice in selecting the programs which they present", one of the rule's objectives as stated in a passage quoted by Westinghouse from the Report and Order adopting it (par. 4, above). Criteria such as "newness of material" are not pertinent in the ABC type situation, since the great bulk of network material is new to television. Westinghouse also overlooks some other matters, such as the fact that the question was whether waiver should be permitted for a half-hour *in addition to* the three hours of Olympic material per night which ABC planned to and later did present.[11]

[11] In a footnote to its petition, Westinghouse urges another point: the Commission's action granting waiver here ignores the desirability of encouraging the presentation of such material on public television stations (as the companion *Elizabeth R.* series was presented), by limiting its presentation on commercial stations. This is much too speculative to afford reason to deny the waiver, in the absence of any showing as to what public television stations would be interested in, or could afford, the program; and, also taking into account the much greater audiences which commercial stations generally have and the fact that, as we have stated in the Sixth Report and Order and since, the obligation to carry cultural and educational material is not confined to ETV or public television stations.

109-024—73——8

GENERAL CONSIDERATIONS AND PROCEDURES FOR THE FUTURE

18. For the foregoing reasons, after careful consideration, we find that our action granting waiver for the *Six Wives of Henry VIII* program was correct and should be affirmed. However, viewed in its other aspect—as a general statement of concern and position—the Westinghouse petition is more substantial.[12] For example, as to the procedural question, while we do not concede that there is any legal obligation to give notice of waiver requests in these "off-network" cases, any more than with requests for waivers of our rules generally, we must also recognize that there may be other pertinent facts in these cases, not within either our knowledge or that of the petitioner for waiver, which interested parties should have opportunity to bring to our attention by way of comment before we act on the request. Chiefly, these would relate to what the impact would be on the production and sale of new material, taking into account both the time which would be devoted under the waiver of the "off-network" program, and the extent to which that program might impair the demand for new material of a particular type (see par. 15, above). Accordingly, as discussed below, in the future public notice an opportunity to comment will be provided in cases such as the four "off-network" waiver requests which have been before us this year.

19. Moreover, we are of the view that this whole subject deserves more orderly treatment than it has had under the procedures which have applied so far, which have involved *ad hoc* consideration of individual requests. In this connection, while we believe our decisions have adequately expressed the situations on which they are based, there have been charges, both by outsiders and by Commissioners on both sides of the question, that we are really making subjective judgments as to program *quality*. This is at least a potential danger in the present system. We have attempted to deal with these aspects of the matter in the recent Notice of Inquiry and of Proposed Rule Making concerning the prime time access rule generally (Docket No. 19622), proposing various approaches to these problems. These include (inter alia) an exemption in the rule for short program series (in the news and public affairs area, or generally), appropriate objective standards for evaluating programs for which waiver is requested, and (if the rule is to remain substantially in its present form) a rule that all such waiver requests for a season be filed well in advance of that season (with public notice and opportunity for comment) and be considered together. This is regarded as one of the most important areas in the Notice, and we hope that helpful comments will be filed, which will enable us to formulate a rule obviating the need for giving serious consideration to numerous waiver requests or, at least, an orderly way of doing so.[13]

[12] In other words, Westinghouse's arguments have more pertinence as general observations than they do in the context of *this case*. It is noted that Westinghouse did not seek reconsideration of the early *Wild Kingdom* action granting waiver, nor (after being apprised of it) did it oppose the petition for reconsideration of our denial in *National Geographic*, even though both of these involved material which might well occupy a full year.

[13] Westinghouse essentially advocates another approach to dealing with these problems: grant no waivers at all. It is clear from our comments concerning this specific decision, above, that we could not find such an approach acceptable.

20. Pending resolution of this proceeding—which is expected at least by next spring—we believe it appropriate to adopt a general policy of not granting waivers of this sort, unless there is a showing of special circumstances which make an earlier decision appropriate and in the public interest. This should cause little or no hardship, in view of the short time interval involved (less than six months), and the fact that station programming—what material stations have, and what they will present—is probably already pretty well "set" for the 1972–73 season, or at least the first half of it. Interested parties are therefore advised that, in the absence of a showing of special circumstances, action on their requests in advance of an over-all decision is unlikely.

21. To summarize, in the immediate future the following procedure will apply:

(a) Requests for general waiver of the "off-network" provisions of the prime time access rule, contained in Section 73.658(k)(3), will in no event be acted on until more than 45 days after public notice of such requests is given.[14] Interested parties may file comments on such requests within 20 days of such public notice, and replies to such comments may be filed within 7 days.

(b) In the absence of a showing of special circumstances making action appropriate, it is unlikely that there will be grant of waiver requests of this sort, pending the over-all decision in the rule-making proceeding instituted on October 26, 1972 (Docket 19622).

22. In view of the foregoing, IT IS ORDERED, That the "Petition for Reconsideration", filed on August 4, 1972, by Westinghouse Broadcasting Company, Inc., seeking reconsideration of the Commission's decision of June 28, 1972, granting waiver of Section 73.658(k)(3) for the Six Wives of Henry VIII program series, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[14] The waiver requests referred to here are those of the types involved in the four "off-network" decisions of 1972: requests either by a program supplier or a station licensee, asking that waiver be granted with respect to a particular off-network program or programs, either generally or for a large number of occasions. This does not include individual requests by stations for waiver of the rule on one or a few occasions, where the programming involved is off-network as well as network. It also does not include any additional requests which may be filed for waiver with respect to the *National Geographic* program, in addition to the five stations granted October 26, 1972.

F.C.C. 72-1131

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

REQUESTS OF ABC AND NBC FOR WAIVERS OF THE "PRIME TIME ACCESS RULE" (SECTION 73.658(k)) IN CONNECTION WITH VARIOUS SPORTS EVENTS IN LATE 1972 AND EARLY 1973.

MEMORANDUM OPINION AND ORDER

(Adopted December 13, 1972; Released December 19, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONER H. REX LEE CONCURRING IN THE RESULT.

1. The Commission here considers various requests for waiver of the "prime time access rule", Section 73.658(k), filed by American Broadcasting Company (ABC) and National Broadcasting Company, Inc. (NBC) on November 17, 1972 and October 31, 1972, respectively. One of the NBC requests has been previously ruled on (the "Academy Awards" program); the other ABC and NBC requests all involve sports programs. Only one date—NBC's combined Rose Bowl and Orange Bowl football coverage on January 1—involves a waiver which will be necessary for carriage of the games under all circumstances; the rest are in the nature of "contingent waivers" if the events run longer than anticipated, either running from late afternoon over into prime time or scheduled in the evening and (in some time zones) possibly using more of prime time than the amount scheduled. In previous action we have granted waivers for most, though not all, of the types of events included here.

2. In this present action, we are dealing only with events occurring through February 28, 1973. This is true chiefly because the subject of sports events, and how to handle them in relation to the prime time access rule, is at issue in Docket 19622, the overall inquiry and rule-making proceeding concerning the prime-time access rule begun October 26. Initial comments in this proceeding are due December 22, 1972. Before dealing with events fairly far in the future, we believe it desirable to have at least a cursory review of the material which may be filed initially in that proceeding, to see whether our waiver policy so far has aroused any significant reason for dissatisfaction on the part of parties interested in the rule and its application.[1] Decision on remaining requests should be forthcoming by late January.

[1] There is another reason for not going beyond the end of February at this time. As to NBC's hockey telecasts, we are willing to assume initially that its 2½ hour allotment is sufficient, but observation is needed to determine whether that appears to be generally enough, before proceeding further.

3. The various requests may be grouped as follows:

(a) *NBC's New Year's Day coverage of the Rose Bowl and Orange Bowl football games*, starting at 4:30 p.m. E.T. with the former, and at its conclusion switching to the Orange Bowl game, until about 11 p.m. NBC states that changes in scheduling which might minimize the problems in relation to the rule are not possible because of the tight scheduling arrangements involved in these games and related events such as parades, regattas, and receptions. This is the only event dealt with here which involves an absolute waiver rather than a possible "runover".[2]

(b) *Late afternoon football games.* Both networks seek waiver for football games estimated to run no more than three hours, in the case of NBC to be followed by a half-hour post-game show. ABC's event is the Hula Bowl from Hawaii on January 6, 1973, scheduled from 4–7 p.m. E.T. (with no pre-game or post-game material). NBC's coverage is the Super Bowl game on January 14, scheduled to start about 3:30 p.m. E.T., with a post-game show of about one-half hour consisting of player interviews, highlights, and the presentation of the NFL championship trophy.

(c) *Golf tournaments.* ABC on three weekends, and NBC on one weekend, will cover well-known golf tournaments on both Saturday and Sunday. NBC's program (Bob Hope Desert Classic, February 10 and 11, 1973) is scheduled from 5 to 6:30 p.m. E.T.; ABC's pattern is 6 to 7 p.m. E.T. on Saturday and 5 or 5:15 to 7 on Sunday, on three weekends in January and February. In both cases, waiver is sought in case weather delays or "sudden death" playoffs might cause the programs to run after 7 E.T. ABC states that the PGA Tournament Players Division has said that play should normally be completed before 7, and that even if play is not completed on Saturdays it does not continue coverage after 7 except in unusual circumstances.

(d) *Basketball.* ABC requests waiver in case it should be necessary in an NBA basketball game on February 25, scheduled at 4:45 E.T., and thus scheduled on the basis of no more than 2¼ hours, which, as ABC mentions, we said in the Docket 19622 Notice appears generally adequate for basketball.

(e) *Hockey.* NBC will present National Hockey League games this season, the first one on December 29, 1972. Most will be in the afternoon; NBC states that these are presently planned to begin at 3 p.m. E.T., but changes in league schedules, weather delays, etc. might make a later start desirable. A few, including the first one, are scheduled for prime time, starting at 8:30 p.m. E.T. NBC asks for a blanket waiver on the basis of allowing 2½ hours for these games; it avers that the New York Rangers management states the average time of games to be 2 hours 20 minutes. Information from the Washington attorney for the NHL is to the effect that the majority of the games should be over in 2½ hours in the absence of playoffs, which do not occur in regular-season games.

CONCLUSIONS

4. Upon consideration of these requests (through February 28, 1973), we conclude that waiver as requested is warranted. As noted,

[2] NBC also requests waiver for the "fill" material, probably no more than 15 minutes, which it will present if the Orange Bowl is over more than a few minutes before 11 p.m. E.T.

only one event—NBC's New Year's Day Rose-Orange Bowl coverage—involves an absolute waiver. We granted this for 1972 (*Prime Time Access Rule*, 30 FCC 2d 577, 579 (1971)), and in our view it is warranted again to permit coverage of these traditional and popular contests, particularly with scheduling changes, which would comply with the rule, being difficult or impossible to make. The other matters involve possible (through apparently not likely) "over-run" situations, where waiver may well not be used even if it is granted. As to the football and basketball contests, the time alloted appears reasonable, so that waiver is unlikely to be necessary in the normal course of events and is appropriate in the unlikely event that it should be required. The same is true of NBC's one golf-tournament coverage. As to ABC's three golf tournaments, we would have been more reassured if that network followed a similar scheduling pattern to that of NBC, allowing a half-hour leeway; in any event it appears probable that waiver will not be needed, and it is granted herein as it has been in the past. With respect to NBC's hockey games, we are willing to assume as an initial matter that a 2½ hour time allotment is sufficient in normal course; but, as mentioned, we believe that we should have opportunity to observe some of these games before granting waiver beyond the end of February. It is hoped that NBC will start its afternoon broadcasts before 4:30 p.m. E.T. if it is reasonably possible to do so. Its evening contests present less of a potential problem, because waiver will be needed, if at all, only in the Mountain and/or Pacific time zones.

5. Accordingly, IT IS ORDERED, That:

(a) Stations commonly owned or affiliated with the National Broadcasting Company, Inc. television network MAY PRESENT, on January 1, 1973, up to four hours of NBC programming during prime time.

(b) Stations commonly owned or affiliated with the NBC television network or the American Broadcasting Companies, Inc. (ABC) television network MAY CARRY TO COMPLETION, without counting toward the permissible three hours of network prime-time programming, coverage (not including any post-event material except as indicated) of:

(1) The Hula Bowl game on January 6, 1973, if the telecast starts at or before about 4 p.m. E.T.;

(2) the Super Bowl game on January 14, 1973, including a half-hour of post game material, if the telecast starts at or before 3:30 p.m. E.T.;

(3) an NBA basketball game on February 25, 1973, provided the game starts at or before about 4:45 p.m. E.T.;

(4) golf tournaments on Saturdays and Sundays, January 27–28, February 3–4, February 10–11, February 17–18, 1973; and

(5) through February 28, 1973, professional hockey games starting no later than about 4:30 p.m. E.T.

(c) Stations affiliated or commonly owned with the NBC network in the Mountain and Pacific zones MAY CARRY, through February 28, 1973, professional hockey games on the assumption that the game telecast lasts no more than 2½ hours.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-29

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of RADIO ENTERPRISES OF OHIO, INC., ASHTABULA, OHIO For the Renewal of License of Station WREO, Ashtabula, Ohio	Docket No. 19207 File No. BR-950

APPEARANCES

John P. Bankson, Jr., Esq., on behalf of Radio Enterprises of Ohio, Inc.; *Joseph E. Finley, Esq.*, on behalf of Local 880, Retail Store Employees Union; and *Joseph Chachkin, Esq.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted January 10, 1973; Released January 18, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT; COMMISSIONER HOOKS ABSENT.

1. This proceeding involves the application of Radio Enterprises of Ohio, Inc., for renewal of license for standard broadcast Station WREO located in Ashtabula, Ohio. By Order, FCC 71-401, 29 FCC 2d 215, released April 26, 1971, we designated the above-captioned application for hearing on the following issues:[1]

> 1. To determine whether Station WREO ceased carrying Local 880's advertisements because of economic pressure; and
>
> 2. To determine whether, in light of the evidence on the above issue, a grant of the application for renewal of license of Station WREO would serve the public interest, convenience and necessity.

2. Evidentiary hearings were held on August 3 and 4, 1971, before Hearing Examiner Isadore A. Honig,[2] and the record was closed on August 4, 1971. On February 7, 1972, the Hearing Examiner released an Initial Decision (FCC 72D-7) proposing to grant the application for renewal of license of Station WREO. In so doing, the Hearing Examiner resolved the hearing issues in Station WREO's favor and as indicated in paragraph 21 of the conclusions in the Initial Decision, summarized the proceeding as follows:

> Since it has been concluded that Station WREO did not cease carrying Local 880's ads because of economic pressure and since there is no evidence that WREO's decision was made in deference to Hill's importance as an adver-

[1] The procedural background of this case is set forth in our designation Order and need not be repeated here.

[2] By order, FCC 72-760, released August 30, 1972, we authorized these officials to change their title from Hearing Examiner to Administrative Law Judge, with the change to be effective September 6, 1972.

tiser . . ., it is therefore concluded that a grant of the application for renewal of license of Station WREO would serve the public interest, convenience and necessity.

3. Now before us for consideration is a statement in support of the Initial Decision and limited exceptions which have been filed by Radio Enterprises of Ohio, Inc. (WREO). We have reviewed the Examiner's findings and conclusions contained in the Initial Decision and believe that they represent a fair and reasonable interpretation of the record evidence developed in this proceeding. Therefore, except as modified in the rulings on the exceptions contained in the attached Appendix, the Initial Decision is adopted.

4. ACCORDINGLY, IT IS ORDERED, That the application (BR-950) of Radio Enterprises of Ohio, Inc., for renewal of license for standard broadcast Station WREO, Ashtabula, Ohio, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Rulings on the Exceptions of Radio Enterprises of Ohio, Inc., to the Initial Decision.

Exception No.	*Ruling*
1, 3–5, 7, and 10	*Denied* as decisionally insignificant. The Examiner's findings constitute a fair and reasonable recapitulation of the record evidence. Moreover, the Examiner is not required to make findings and conclusions on every conceivable point on which evidence is offered.
2	*Granted.* The Examiner's findings are modified to the extent noted by him in paragraph 19 of the conclusions of the Initial Decision.
6 and 9	*Denied.* We find nothing improper in the Examiner's analysis of the record evidence in these conclusions. Indeed, because of the very nature of the charges alleged in this proceeding, the motives and intentions of certain individuals were called into question at the outset. The Examiner's brief comments in this connection to point out that the record evidence clearly dispels any doubts in this regard, we believe, were appropriate and necessary to any reasoned determination of the hearing issues. Moreover, the Examiner made clear that his observations in this respect were not accorded any decisional significance.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

Since 1968 the Federal Communications Commission has sought, without any reasoned deliberation, to renew the license of station WREO, Ashtabula, Ohio. Today, after reluctantly going through a process of "fact finding," the majority finally gets it chance and pounces on it hungrily. The case's Kafkaesque history concluded, the license is renewed.

Radio Enterprises of Ohio, the licensee, filed this renewal application in 1967. The application was challenged by a petition to deny by Local 880 of the Retail Store Employees Union. The union was at that time engaged in a strike against the Hills Department Store of Ashtabula. It charged that WREO had canceled its carriage of

the union's paid announcements about the strike due to economic pressure from the Hills store. The union also alleged that the station had violated the fairness doctrine by broadcasting the Hills store's regular advertisements while, at the same time, refusing to carry the union's arguments in favor of the strike.

On December 2, 1968, without a hearing, without an inquiry, without so much as a pause, the FCC renewed the license to station WREO.

The union sought judicial review and, on appeal, the court reversed, concluding that the FCC must hold a hearing in order to determine whether or not the licensee had capitulated to economic pressure from one of its major advertisers. *Retail Store Employees' Union, Local 880* v. *FCC*, 436 F. 2d 248 (D.C. Cir. 1970). The court held, further, that the Commission had failed to explain the reasons underlying its denial of the union's fairness doctrine charge.

The case's subsequent history reveals quite well this Commission's contempt for the United States Court of Appeals.

First, on remand the Commission literally ignored the court's lengthy discussion of the fairness doctrine and its application to this case. The court held, first, that the labor dispute presented a controversial issue of public importance—at least in the Ashtabula area. Second, the court noted that the fact that Hills' advertisements had not mentioned either the union or the strike was *not* determinative to the resolution of the fairness question. In effect, the court found considerable merit to the union's argument that WREO's carriage of Hills' advertisements constituted an implicit argument in *favor* of patronizing the store, and that those advertisements therefore constituted advocacy of one side of a controversial issue of public importance. (The union, of course, was interested in presenting a case for why listeners might not want to patronize the store.)

The FCC responded to this judicial analysis with classic bureaucratic inaction.

First, the Commission deferred decision on the fairness aspects of the union's petition pending the results of our current fairness inquiry. 29 FCC 2d 215 (1971). I believe that we could and should have decided the fairness issue after the court's 1970 remand. However, since we did defer our ruling, I cannot see how we can now grant this licensee an outright renewal.

The fairness question remains unresolved. It is, in my judgment, quite conceivable that Radio Enterprise's conduct constituted a violation of our rule. In any event, with this question unresolved, I find it remarkable that the majority blithely renews this license. As long as the fairness question is to be deferred, it seems to me the most we could do on the station's behalf (if that be our goal) is to also defer the renewal.

There are, however, substantial reasons why this license renewal application should be denied—even absent a resolution of the union's fairness complaint.

For reasons which remain unexplained, the union has chosen not to appeal the hearing examiner's initial decision. The station has taken certain minor exceptions, however, and the record, which is properly before us, simply does not support the examiner's conclusion that a grant of this renewal would serve the public interest.

On order from the court, the Commission designated this renewal for hearing to determine whether WREO had cancelled the union's paid announcements because of pressure from Hills Department Store. Presumably, a finding that such pressure had indeed led to cancellation would warrant a grant of the union's petition to deny.

The hearing examiner found that Mr. Richard Moore, President of the advertising agency of which Hills was a client, had made inquiries of several broadcast station which were carrying both Hills' and the union's advertisements. Mr. Moore, who had never seen a copy of the union's announcement, asked whether WREO had checked that announcement for accuracy. Despite a decision by WREO's general counsel to the effect that the announcements were not libelous and that there was no basis for a law suit, WREO's President and its general manager decided to cancel those announcements.

When questioned during the hearing, WREO's officers testified that the union's announcements had been cancelled due to listener complaints. The examiner believed that excuse despite the fact that none of WREO's officers could recall *any* names of the listeners who allegedly objected to the announcements, despite the fact that *none* of these alleged complaints had been recorded, despite the fact that the station had *never* before cancelled announcements due to listener complaints, and despite the fact that it was Mr. Moore's inquiries that appear to have initiated the process which concluded in the station's decision to cancel.[1]

Faced with what he apparently viewed as a factual quagmire, the hearing examiner illustrated a "curious neutrality in favor of the licensee." *See Office of Communications of United Church of Christ* v. *FCC*, 425 F. 2d 543 (D.C. Cir. 1969). Indeed, the examiner appears to have placed upon the *union* the burden of proving—virtually beyond a reasonable doubt—that the licensee had buckled under to economic pressure from Hills. In so doing, the examiner erred.

Under § 309 of the Communications Act of 1934, a license renewal application must be designated for hearing when a petition to deny raises substantial or material questions of fact which indicate that a grant of the renewal application would be *prima facie* inconsistent with the public interest. Since the court of appeals ordered the FCC to designate the instant renewal application for hearing, it is clear that the court was of the view—even if the FCC was not—that the union had presented facts making out a *prima facie* case against renewal of the license to WREO. In such circumstances, one would expect that the ultimate burden of proof would be upon the licensee. *See, e.g., Application of Chronicle Broadcasting Co.*, 16 FCC 2d 882 (1969). Both the hearing examiner and the FCC majority appear to me to have ignored the law's clear mandate.

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[1] The record also reveals that WHHH, Warren, Ohio, which was not a party to this proceeding, admitted that it had refused to run the union's announcements because the station was unable to get approval from Hills Department Store. The Hearing Examiner made nothing of this bizarre concession, nor does the majority's opinion allude to it. Indeed, it appears that this Commission does not even intend to notify WHHH that such conduct should not be repeated in the future. Such a result is surely odd once one realizes that this Commission has just completed a very long proceeding in order to determine whether WREO engaged in the very conduct in which WHHH admits it engaged.

Even assuming, arguendo, that the record taken as a whole supported the examiner's conclusion that WREO's cancellation of the union's announcements was not due to pressure from Hills Department Store, the station's stated reason for censoring the union raises serious questions. The licensee relies upon the rather apocryphal excuse that it cancelled the union's paid announcements—and thus denied the union access—because of listener complaints. Such an excuse—however dubious—squarely presents this Commission with the question whether a broadcaster may unilaterally dictate which views the community will be permitted to hear.

A strikingly similar question was presented to this Commission in *Business Executives Move for Vietnam Peace*, 25 FCC 2d 242 (1970). There, the majority upheld, over my dissent, *id.* at 249, the right of a broadcaster to refuse paid access to a group seeking to advocate an admittedly controversial position. That decision was reversed by the United States Court of Appeals, *Business Executives Move for Vietnam Peace* v. *FCC*, 450 F. 2d 642 (D.C. Cir. 1971). The court reasoned that a broadcaster's blanket policy against selling time to groups desirous of discussing important and controversial issues violated the First Amendment's ban against censorship. (The case is now pending decision from the Supreme Court.)

The majority acts as if the court of appeals had never spoken on these issues. I dissent.

F.C.C. 72D-7

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of RADIO ENTERPRISES OF OHIO, INC., ASHTABULA, OHIO For the Renewal of License of Station WREO, Ashtabula, Ohio	Docket No. 19207 File No. BR-950

APPEARANCES

John P. Bankson, Jr., Esq., on behalf of Radio Enterprises of Ohio, Inc.; *Joseph E. Finley, Esq.*, on behalf of Local 880, Retail Store Employees Union; and *Joseph Chachkin, Esq.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER ISADORE A. HONIG

(Issued February 1, 1972; Released February 7, 1972)

PRELIMINARY STATEMENT

1. This proceeding concerns the application for renewal of the license for Station WREO, filed by Radio Enterprises of Ohio, Inc. (WREO), Ashtabula, Ohio. An outline of the events preceding the designation order will place the proceeding in proper perspective. In the spring of 1966, a labor dispute between Retail Store Employees Local 880, a respondent in this proceeding (hereinafter Local 880), and Hill's Department Store in Ashtabula, Ohio, became the subject of a series of paid commercial spot announcements by Local 880 broadcast over Station WREO in Ashtabula. WREO was not a party to the dispute between Local 880 and Hill's. Upon cancellation of Local 880's commercial spot schedule by WREO, a complaint under the fairness doctrine was filed by Local 880 with the Commission and denied by letter on April 29, 1966. About the same time, the Union charged Hill's with a violation of the National Labor Relations Act by exerting economic pressure against WREO and other radio stations to persuade them to cancel the Union's advertising. This charge was rejected by the National Labor Relations Board's Office of Appeals on March 14, 1967.

2. Subsequently, Local 880 filed a petition to deny *inter alia*, the WREO application for renewal of license filed in 1967.[1] After considerable correspondence, the Commission granted the WREO application for renewal of license. The Commission order granting the WREO license renewal was appealed to the United States Court of

[1] Local 880 also petitioned to deny the 1967 renewal applications of WFMJ, Youngstown, Ohio; WHHH, Warren, Ohio; and WLEC, Sandusky, Ohio. However, those renewals were granted and are not in issue here.

Appeals for the District of Columbia Circuit by Local 880. By decision of October 27, 1970, the Court of Appeals reversed and remanded the case to the Commission for further consideration, *Retail Store Employees Union, Local 880* v. *FCC*, 141 U.S. App. D.C. 94, 436 F. 2d 248 (1970). In reversing, the Court held that the Union's allegations of economic pressure against WREO raised questions which were not satisfactorily answered by the station's and Hill's responses to Commission inquiries.[2] As noted by the Commission in paragraph 3 of the designation order herein, the Court referred to the rejection by the other area stations of the Union's ads, the ambiguity surrounding WREO's explanation for cancelling the announcements, and the failure of the station to explain whether it had made any other efforts to resolve the controversy by carrying a smaller number of the announcements or suggesting that their texts be varied more frequently.

3. On April 26, 1971, the Commission, by its Order, 29 FCC 2d 215, designated the renewal application for hearing on the following issues:

(1) To determine whether station WREO ceased carrying Local 880's advertisements because of economic pressure;

(2) To determine whether, in light of the evidence on the above issue, a grant of the application for renewal of license of station WREO would serve the public interest, convenience and necessity.

The Commission ordered that Local 880 be made a party to the proceeding and placed on it the burden of proceeding with the initial presentation of evidence as to Issue (1). WREO was assigned the burden of proof on Issue (1) and the burden of establishing under Issue (2) that a grant of its application would serve the public interest, convenience, and necessity.

4. In paragraph 4 of the designation order, the Commission stated that in "determining the factual circumstances surrounding WREO's cancellation of Local 880's ads, the hearing examiner should initially consider the investigation made by the National Labor Relations Board, in order to judge the weight to be given to the Board's determination." In accordance with the Commission's directive, the parties cooperated in furnishing the Examiner with all available documents pertaining to the NLRB's investigation. In this connection, the Bureau inspected the case files of the NLRB. The only relevant material uncovered was an interoffice memorandum dated August 22, 1966, concerning a telephone conversation between an NLRB field examiner and WREO general manager John Colin. The memorandum recited that Mr. Colin would not discuss the union charge of economic pressure by Hill's Department Stores because of the pendency of the lawsuit brought by Local 880 against WREO.

5. On the basis of the information supplied to him by the parties,[3] the Examiner concluded that he could not find that the NLRB investigation was sufficiently adequate to warrant reliance by the Commission. He further concluded that the NLRB's disposition of Local

[2] The Court stated (436 F.2d 248, 259): "In summary, we believe that the Union's evidence of denial of access to radio air time raised questions regarding improper influence by Hill's that were not adequately answered by Hill's bare denial and the station's letter of denial and explanation."

[3] The available documents bearing on the NLRB investigation into the charge by Local 880 of economic coercion of various radio stations by Hill's are listed at pp. 83–86 of the transcript herein.

880's charges would not be relied on in determining issue (1). The parties to this proceeding concurred in the Examiner's ruling (Tr. 82).

6. In designating the WREO renewal application for hearing, the Commission directed the Hearing Examiner to require appropriate utilization of discovery procedures with an eye toward the expeditious resolution of "all relevant factual disputes" and to aid him in determining whether a full evidentiary hearing was required. Discovery was initiated by counsel for WREO prior to the prehearing conference on June 11, 1971, and by the Broadcast Bureau on June 25, 1971. It was the parties' view, however (Tr. 43–44), and also that of the Examiner (Tr. 60), that proper resolution of the issues, which would involve the question of credibility of some of the witnesses, could be attained only by a full evidentiary hearing. Therefore, it was determined to pursue this course.

7. A prehearing conference was held on June 11, 1971. Hearing sessions were held on August 3 and 4, 1971, in Cleveland, Ohio.[4] The record was closed on August 4, 1971. Proposed findings of fact and conclusions were filed by Local 880 on November 8, 1971, and by WREO and the Broadcast Bureau on November 10, 1971.

FINDINGS OF FACT

8. Radio Enterprises of Ohio, Inc. is the licensee of standard broadcast station WREO, Ashtabula, Ohio.[5] Donald C. Rowley has been president, treasurer, as well as a director, of the corporation since February 20, 1945. Mr. Rowley holds 42.1% of the stock of the corporation (144 shares out of the 342 shares which have been issued). The remaining shares are divided among members of Mr. Rowley's family. John A. Colin has been vice-president and director of the corporation since June 20, 1952 (Official Notice taken of WREO Ownership Report filed June 19, 1970). Mr. Colin also serves as General Manager and general counsel of WREO (Tr. 294).

9. Gary Sharp is vice-president in charge of media buying for the Jack Sharp Advertising Agency (Tr. 92–93). In the period running from the middle to the latter part of February 1966, Sharp, acting on behalf of Local 880, placed radio time with a number of radio stations throughout northeastern Ohio, including WREO, regarding the strike of members of Local 880 against Hill's Department Store in Ashtabula, Ohio. The other stations with which Sharp placed this advertising were WLEC in Sandusky, WEOL in Elyria, WFMJ in Youngstown and WWOW in Conneaut (Tr. 93).

10. WREO began carrying Local 880 advertisements on February 16, 1966, and continued carrying such spots until April 7, 1966 (WREO Ex. 9); Local 880's ads were discontinued by station WREO on April 7, 1966 (WREO Ex. 9). In all, WREO carried approximately 322 announcements on behalf of Local 880 during the period in question (WREO Ex. 11).

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[4] The situs of the hearing was changed from Ashtabula, Ohio, when it was found that hearing room facilities were not available there.

[5] Official U.S. Census figures for 1970 show Ashtabula's population at 24,813. The Commission's license files reveal that in 1966, in addition to WREO, stations WREO–FM and WAQI–AM were also operating in Ashtabula (Official Notice taken).

11. WREO and Sharp entered into six separate contracts covering the placement of 60 second spot announcements on behalf of Local 880. The first contract entered into on February 15, 1966 called for the placement of 28 spot announcements (7 per day on Wednesday, Thursday, Friday and Saturday) during the period of February 16 to February 19, 1966. Succeeding contracts called for the placement of 42 announcements (7 per day, Monday through Saturday) from February 21 to 26, 1966, from February 28 to March 5, 1966, from March 7 to March 12, 1966 and from March 14 to March 19, 1966 (WREO Ex. 2, pp. 1–5).

12. The final contract entered into on March 18, 1966, specified the regular carriage of 42 announcements (7 per day) per week during Monday through Saturday, beginning March 20, 1966. The contract, however, further provided for the scheduling of 14 spots per day instead of 7 spots per day *only* on Friday, April 1, and Saturday, April 2. This contract, unlike the prior contracts, did not specify a termination date. In lieu thereof, the contract contained a "Till Forbid" provision which permitted the contract to be cancelled by either party on two days' notice (WREO Ex. 2, p. 6; Tr. 226).

13. Don Fassett, who was station manager of WREO in 1966,[6] accepted the original order as well as the subsequent orders for advertising time on behalf of Local 880 (Tr. 176–177).[7] Fassett's name appears on the six contracts for Local 880 spots discussed above (WREO Ex. 2). Prior to acceptance of the initial contract in February, 1966, Fassett referred the contract to Donald C. Rowley, president of WREO (Tr. 177). It was not the practice at the station to refer every contract to Rowley. However, Fassett did so in this instance "because of possible legal involvements" (Tr. 178). Fassett does not recall what "legal involvement" he had in mind or what specific provisions of the contract prompted him to bring the matter to Rowley's attention (Tr. 179). In this connection, Fassett does not recollect whether the advertising copy was attached to the contract (Tr. 177).

14. As General Manager Colin was responsible in 1966 for accepting advertising contracts. However, at the time that Fassett brought the Local 880 contract to Rowley's attention, Colin was away on vacation (Tr. 223–24). Rowley believes it is the policy of the station that all new advertising contracts are brought to Colin. He stated, however, that "it depends on the particular contract, . . . the involvement of the contract or the extent of the contract", whether new contracts are brought to Colin before or after the contract is accepted (Tr. 224).

15. Rowley recalls that Fassett showed him a copy of the script at the time the Local 880 contract was brought to his attention (Tr. 224–25). Rowley reviewed the script and gave his approval to run the advertising for Local 880 on the air (Tr. 225). He does not recall that there were several succeeding advertising contracts with Local 880 (Tr. 225). Upon Colin's return on March 4, 1966, he also reviewed the Local 880 copy being used on the air (Tr. 314–315).

16. In the period of February 15, 1966 to April 5, 1966, WREO did not raise any objections to the Local 880 advertisement (Tr. 94). Similarly, WREO did not request that the copy used on the air be changed

[6] Fassett is now national sales director for WREO (Tr. 176).
[7] Fassett also serviced the Hill's Department Store account (Local 880 Ex. 5, p. 1).

or altered in any manner (Tr. 121, 319). In fact, there was never any discussion by WREO management concerning the possibility of requesting changes in the copy (Tr. 237). There is no evidence that prior to April 4, 1966, Colin ever recommended to Rowley that Local 880 ads should be cancelled (Tr. 342).[8]

17. Local 880's advertising agency provided WREO with the spot announcement copy that it wanted broadcast initially, and the first copy was broadcast a total of 70 times, seven times a day for a total of ten days beginning February 16 and ending on February 26, 1966. The full text of that spot announcement read as follows (WREO Ex. 1):

Here is an important message from RETAIL STORE EMPLOYEES UNION LOCAL 880—regarding the reasons behind the strike at HILL's DEPARTMENT STORE in Ashtabula. The strike now in progress at Hills comes after seven months of continuous negotiations, during which no agreement has been reached between the Retail Store Employees Union Local 880—and the management of HILL'S Department Store. Important issues still not resolved included Union Security, Arbitration and Grievance Procedure, Health and Welfare, Funeral Leave, and Visitation Rights to the Store. *In as much* (sic) *as those, and other issues are vital to the betterment of the store employees working conditions, the strike has received the sanction of the ASHTABULA FEDERATION of LABOR, and thereby has its complete support! In accordance with the Federation's backing,*[9] the 2,000 area members of Retail Store Employees Union Local 880 request that *all* union members, their families and friends observe and respect the picket line now at HILLS DEPARTMENT STORE.

18. Subsequently, the Union's advertising agency submitted only one copy change which was broadcast from February 28 through April 7, 1966, a total of 34 days and 252 spot announcements (including the double schedule of 14 spots each on April 1 and April 2).[9a] The revised announcement read as follows (WREO Exs. 1 and 2):

Here is an important message from RETAIL STORE EMPLOYEES UNION LOCAL 880—regarding the reasons behind the strike at HILL'S DEPARTMENT STORE in Ashtabula. The strike now in progress at HILLS comes after seven months of continuous negotiations, during which no agreement has been reached between the Retail Store Employees Union Local 880—and the management of HILL'S DEPARTMENT STORE. Important issues still not resolved include Union Security, Arbitration and Grievance Procedure, Health and Welfare, Funeral Leave, and Visitation Rights to the Store. *These and other issues are vital to the betterment of the store employees working because—if they all go out—the Company would try to replace them with non-union help who could be granted a vote in subsequent elections.* The 2000 area members of Retail Store Employees Union Local 880 request that *all* union members, their families and friends observe and respect the picket line now at HILLS DEPARTMENT STORE!

Approximately 75% of the copy was unchanged; the underlined portions in the two announcements are the portions which differed in the two announcements.

19. Richard R. Moore is president of the Smith Advertising Agency, Inc. located in Youngstown, Ohio (Tr. 123). Mr. Moore has been with the agency approximately 13 years (Tr. 123). In 1966 the Smith agency represented Hill's Department Store (Hills) and Moore handled the account (Tr. 123–24). Moore placed ads on behalf of Hills with a number of radio stations in the northeastern Ohio area, including

[8] Colin, when questioned whether he had recommended cancellation prior to April 4, 1966, testified: "I do not remember it" (Tr. 342).

[9] Underscoring supplied in both announcements with respect to the only part of the text that was changed.

[9a] WREO raised no objection with the Union concerning frequency of its spots (Tr. 319–20).

WREO (Tr. 124). These area stations, in addition to WREO, were as follows: WWOW, Conneaut, Ohio; WAWI, Ashtabula, Ohio; WFMJ, WBBW, and WKBN, Youngstown, Ohio; WLEC, Sandusky, Ohio; WEOL, Elyria, Ohio; WHHH, Warren, Ohio; and WKST, Newcastle, Pennsylvania (Tr. 124). Hills in 1966 had stores in Youngstown, Sandusky, Warren and Ashtabula, Ohio (Tr. 124–25). One or more of Hill's stores was accessible to listeners from each of the above stations (Tr. 123–25).

20. In 1966, Hill's was a large advertiser of WREO (Tr. 278). For example, in May 1966, Hill's purchased time for 170 announcements which the General Manager of WREO termed "reasonably large" (Tr. 322). The record indicates generally that Hill's was and is among the large regular advertisers of WREO (Tr. 278, 322), although no comparative statistics on users of advertising time were placed in the record. No data relating to Hill's specific ranking in dollar volume in 1966 or any year thereafter were supplied by WREO. Both the manager of the station in 1966 and its president were not able off-hand to evaluate Hill's importance by dollar volume (Tr. 192, 278).[10] The General Manager of WREO could not recall any advertiser who placed more spot announcements than Hill's in May 1966 (Tr. 322). WREO's station manager in 1966 would not, however, rank Hill's among the four largest station advertisers (Tr. 192).

21. The advertisements carried on WREO for Hill's were basically institutional, urging people to patronize Hill's but also advising them of particular seasonal items on sale (Tr. 127, 175). There were no ads aired over WREO concerning Hill's labor dispute with Local 880 (Tr. 175). In 1966, WREO broadcast 1,337 announcements for Hill's Ashtabula. Of this total, 1,190 were broadcast from April 1 to the end of the year.[11] A breakdown shows the following: January—55; February—15; March—77; April—123; May—170; June—110; July—130; August—115; September—121; October—102; November—127; and December—192 (WREO Ex. 9, pp. 1–2). In addition, in 1966, the station broadcast 74 sponsored programs and 14 sponsored one-third segments of football games on behalf of the store, all occurring between April 1 and the end of the year (WREO Ex. 9, pp. 1–2).

22. In connection with placing advertisements on behalf of Hills, Moore dealt with a Mr. Herbert Goldberger, who was president of the Hill's organization (Tr. 125–26). Goldberger's office was located in Boston, Massachusetts (Tr. 126). Moore did not deal to any great degree with the various managers of Hill's department stores (Tr. 126–127). Moore spoke on the telephone to Goldberger approximately once a week. Moore also corresponded with Goldberger at least once a week (Tr. 131). He would propose certain advertising subject to Goldberger's approval and then the advertising would be placed in accordance with what was finally arrived at between himself and Goldberger (Tr. 126).

23. Moore became aware in 1966 that Local 880 was advertising over WREO as well as a number of other stations in northeastern Ohio (Tr.

[10] The Examiner, contrary to the Bureau's suggestion in fn. 1, p. 10 of its proposed findings, did not perceive any unwillingness on the part of WREO's president and station manager to supply information relative to Hill's specific ranking in dollar volume in 1966.

[11] According to WREO's General Manager, the increase in ads beginning in April 1966, was attributable to seasonal announcement practices (Tr. 326).

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127–129). He does not recall hearing the Union's spots broadcast over WREO but believes he may have heard them in Youngstown, Ohio (Tr. 130). Moore assumes that he learned the Local 880 spots were being broadcast through his contacts with the local sales representatives of the various stations involved (Tr. 129).

24. Moore recalls discussing Local 880's ads with Goldberger (Tr. 131). He doesn't recall the date when the subject was first mentioned (Tr. 131). Moore recalls that Goldberger was aware that the advertisement was being carried on various stations but that Goldberger was not sure which specific stations (Tr. 131). According to Moore, Goldberger was concerned and upset about the spots being aired and expressed the view that the union was wrong in urging people to refrain from shopping at Hills because of labor difficulties (Tr. 133, 144, 148).

25. Moore interpreted Goldberger's concern as an indication to him to find out in which communities stations were carrying the Local 880 ads and to raise questions with such stations concerning whether such ads were factually correct (Tr. 150, 152–53).

26. Following his conversation with Goldberger, Moore ascertained the call letters of the stations on which the Local 880 ads were broadcast (Tr. 129, 149–50). Moore recalls becoming aware that the ad was being carried on WREO, as well as stations WWOW, WFMJ, WLEC, and WEOL, Elyria, Ohio (Tr. 126, 128–129). Moore reported back to Goldberger the stations that were carrying the Local 880 advertisements (Tr. 150). He does not recall whether Goldberger gave him any further instructions at that point (Tr. 150).

27. Moore had a conversation with Fassett of WREO during a sales call on the telephone, in which he questioned whether the station had checked out the Local 880 copy to see if it was legal and factually accurate or might open the station to a lawsuit (Tr. 133, 138). Moore testified he didn't indicate to Fassett that he desired the union ads should be discounted, or that Hills was opposed to carriage of the ads or that Hills would discontinue its advertisements if further Local 880 ads were carried (Tr. 138). Moore does not recall Fassett's specific response but believes Fassett stated: "I will check into it" (Tr. 157). Moore did not discuss the Local 880 ads with any other official of WREO (Tr. 134). He was trying to protect the interest of Hills which was his advertising client (Tr. 136), and he desired that Local 880's ads be discontinued only if their content was not factually correct (Tr. 137), although he did not indicate to Fassett such wish.

28. Moore also recalls discussing the legality and accuracy of the content of the copy with the station managers of WHHH, Warren, Ohio, WLEC, as well as one or more Youngstown radio stations (Tr. 141). At the time Moore made these inquiries, he had no evidence that Local 880's ads were inaccurate (Tr. 139). In fact, Moore never saw a copy of the Local 880 ads broadcast prior to his testifying in this proceeding on August 3, 1971 (Tr. 141). Moore testified that he made these inquiries because Hills was his most important client and he was concerned about protecting the interests of his agency and his client (Tr. 153). Moore recognized that his actions were not normal activities for an advertising agency (Tr. 153–54). He has had no occasion to inquire of other stations concerning ads which might in-

jure a client of his in some way since no similar situation has ever arisen (Tr. 154).

29. Fassett's conversation with Moore occurred about March 31, 1966. On the same day, Fassett told Colin of his conversation with Moore and Colin relayed the information to Rowley (Tr. 185–87, 310). Following his conversation with Fassett, Colin, General Counsel for WREO, reviewed the Local 880 advertisement to determine if it contained libelous matter and concluded there was no basis for a lawsuit against the station (Tr. 310).

30. On April 4, 1966, Rowley and Colin discussed the Local 880 advertisements and it was concluded that the advertisements should be terminated (Tr. 277, 311). Colin was instructed by Rowley to take steps to discontinue the ads (Tr. 277), and to prepare a written statement notifying both Moore and the Sharp agency of the station's intention (Tr. 269). Rowley helped prepare the statement which was given to Fassett to deliver on April 5, 1966 (Tr. 188–190, 269).

31. Rowley and Colin have limited recall of the matters discussed at the April 4 meeting (Tr. 275–76, 305–06). Rowley believes there was no discussion relating to the possible effect continuation of the Local 880 ads would have on Hills' advertising over WREO (Tr. 277–78). Rowley doesn't think that continuation of Hills' advertising was a factor which was considered in arriving at a decision but admits that he can't remember (Tr. 278). Rowley believes that complaints which the station received were "probably" discussed on April 4 (Tr. 277), and he unequivocally testified that he and Colin had discussed prior to that date complaints they had heard (Tr. 305–06). Colin recalls discussing complaints that he and Rowley had received and the fact that Local 880 had increased the volume of ads on April 1 and April 2 (14 in lieu of 7). Colin also believes they "could" have discussed the fact that Hills had started to run an ad in the *Ashtabula Star-Beacon*, an afternoon newspaper, concerning the labor dispute (Tr. 306). In this connection, Hills also ran institutional advertising in the newspaper (Tr. 290). Rowley is president, publisher and editor-in-chief of this newspaper [12] and one of the major stockholders, although Rowley was unable to state off-hand the extent of his interest (Tr. 241 244, 279–80). According to Colin, who is also employed by the newspaper (Tr. 294), the newspaper and the radio station are owned by separate corporations and are operated separately, and there is no coordination or consultation between the managers of the newspaper and radio station with respect to news stories or advertisements (Tr. 343–44).

32. The two major reasons cited by WREO in the hearing for cancelling the ads were: (1) complaints from listeners that Local 880's ads had become an irritant; and (2) that the dispute between Local 880 and Hills was a private dispute in which the public was unnecessarily involved (Tr. 232, 243, 249). Rowley, when questioned about the nature of the complaints, replied: "That the advertising was irritating, it was repetitious, it was drumming at the community." (Tr. 232). The same witness commented further (Tr. 249): "I think people were

[12] The *Ashtabula Star-Beacon* is published evenings except Sunday. It has a current circulation of 18,695 (Official Notice taken of 1971 Ayer Directory).

irritated by the repetition. The same continual banging and hammering every hour, every day, doom and gloom." Referring to the increase in the number of Local 880 spots on April 1 and 2 from 7 to 14 daily, Rowley testified (Tr. 249): ". . . it was my feeling that this had gone far enough, . . . this was a spot announcement that had been going on since the middle of February. This hammering at the public and I felt the public was being used. . . . We felt there was nothing new being presented and this kept up a very nagging and annoying situation."

33. Station WREO received no written complaints from listeners concerning the Local 880 ads (Tr. 193). Fassett recalls objections expressed at a Kiwanis meeting concerning the frequency and content of the ads but doesn't recall the names of persons who made the objections (Tr. 193). Fassett also recalls objections made to him after church services but does not recall how many objectors there were (Tr. 199–201). He heard comments of a similar nature from station advertisers but could not recall who these individuals were (Tr. 201). Fassett reported some of these objections to Colin (Tr. 203). Fassett recalls no other occasion during the approximately 8–10 years when he served as station manager on which the station cancelled ads because of listener complaints (Tr. 211).

34. Rowley can't recall the number of complaints which he personally received. He estimates that he heard approximately 15 complaints which began in the forepart of March (Tr. 230–32, 270). He heard complaints while calling on merchants, attending parties or walking in the street (Tr. 269). Rowley can't recall the name of a single complainant other than his wife and sister-in-law (Tr. 231). Rowley had discussions with Colin prior to cancelling the ads in which he told Colin about the complaints he heard and vice-versa (Tr. 229–30). He believes these conversations occurred approximately a week before the Local 880 ads were cancelled (Tr. 274–75). Rowley admits that the station hears "a lot of complaints" generally and that people delight in "pointing things out" and criticising the station (Tr. 232, 270). Rowley assumed that WREO has carried ads which some people regarded as repetitious (Tr. 239). He cannot recall any other occasion from 1952 to the present when an ad was cancelled by the station (Tr. 239).

35. Colin first learned of complaints against Local 880 ads when he returned from vacation on March 4 (Tr. 304). He doesn't recall specific persons who complained. He characterized the complaints he received between March 4 and the time the Local 880 ads were discontinued as "casual type complaints" (Tr. 304). He brought them to the attention of Rowley (Tr. 304).

36. With respect to Rowley's claim that the dispute between Local 880 and Hills was private, Colin conceded that he knew of no change in the nature of the controversy between March 4 and April 4 (Tr. 317). According to Colin, he regarded the airing of the ads all along as a matter of private controversy which he defined as one involving mainly private parties (Tr. 336, 338). In this connection, Colin testified that the station airs private controversies although it tries to avoid them (Tr. 336).

37. In making the decision on April 4 to cancel Local 880's advertising, a number of circumstances were taken into account: (1) doubling of the Local 880 ad schedule on April 1 and 2 (Tr. 305); (2) Hill's advertisement in the newspaper on the same day (April 4) which commented on the strike (WREO Ex. 6, Tr. 257–58, 291); (3) listener complaints as discussed above; and (4) previous Local 880 newspaper advertisements (WREO Exs. 4 and 5, Tr. 258). Mr. Rowley viewed the situation as ". . . all boiling up at this time . . . [and] coming to a climax" (Tr. 243, 256). He thought that the public had heard enough, particularly when listeners are ". . . locked into" a radio station but a newspaper reader can skip over any advertisement (Tr. 242–43). Rowley believed that the repetitious Union ads "were having an effect" on the station's operations in that listeners "could dial another station" (Tr. 242).

38. On April 5, 1966, Fassett was given a written statement by Colin to read over the telephone to a Jack Sharp Agency official and Moore, the advertising agency representative for Hill's (Tr. 189–90). At 10:00 AM on that date Fassett phoned Moore and told him:

> We have decided that we will accept no further copy from either party concerning the strike between Hills and the Union. We are notifying both Hills and the Union (Local 880 Ex. 3).[13]

Moore did not comment on this message (Local 880 Ex. 3). At 10:30 AM on the same day, Fassett called Jack Sharp and delivered an identical message. Although Sharp raised questions concerning WREO's action, specifically querying whether the station had been pressured by Hill's to cancel, Fassett would not comment further and repeated the above-quoted message. However, in response to Sharp's complaint that the contract required two days' notice before cancellation, Fasett called Sharp back and told him the ads would continue to be run until April 7 (WREO Ex. 3).

39. The decision was made to notify Moore as well as Sharp because Colin regarded the decision to cancel the ad as involving both the Union and Hill's (Tr. 332). He wanted to be fair to both parties and to make sure that the decision would apply as well to one side as to the other. Hence, Colin believed the station had an obligation to notify each party to the dispute (Tr. 329–331).

40. Rowley was aware at the time the decision to cancel the Local 880 ads was made that similar ads had run on other stations (Tr. 288). He was not aware of cancellation by WWOW, Conneaut, on March 31, or by WLEC, Sandusky, nor was he aware that a Youngstown station had cancelled the Union's ad (Tr. 289–90). Aside from Fassett's conversation with Moore, no one connected with Station WREO discussed the Local 880 ads with any official or agent of Hill's (Tr. 266–68, 342–43).

41. During February of 1966 the Jack Sharp Agency placed advertising for Local 880 with stations other than WREO regarding the strike at Hill's Department Store in Ashtabula.[14] On March 25,

[13] The record establishes that WREO had carried no announcements on behalf of Hills prior to April 5 concerning the controversy with Local 880 (Tr. 174–5).

[14] The Union copy broadcast in other communities differed from that supplied to WREO. As a witness from the Sharp agency explained (Tr. 107): "One was directed to people in the Ashtabula area and the other one was more or less directed to the people in other communities where there was a Hill's Department Store."

1966, Station WLEC in Sandusky cancelled by registered letter sent to the Sharp agency. No reason was stated for the action (Local 880 Ex. 2, Tr. 96–97). On March 31, 1966, Station WWOW, Conneaut, sent a telegram to the Sharp agency, stating that review of the station's policy necessitated termination of the Union's ad (Local 880 Ex. 1, Tr. 98). The Union's advertising on the station had been running for about a month (Tr. 98). The station's telegram offered 15 minutes free time each to Hill's and the Union for debate if both parties involved felt that debate of the controversy was in the public interest (Local 880 Ex. 1). On March 21, 1966, Sharp placed Local 880 advertising with Station WFMJ in Youngstown. This station ran two spots on March 22 and then cancelled for the stated reason that the Union's dispute with Hill's was in Ashtabula, not at Youngstown, and therefore "was not relevant" to the latter place (Tr. 95). The Union through the Sharp Agency also placed an ad with Station WEOL in Elyria, Ohio (Tr. 93). There is no evidence of cancellation by this station. Gary Sharp, who placed the Local 880 ads relating to the controversy with Hill's, admitted that no information came to his personal attention which would lead him to infer that Hill's had communicated with Station WREO concerning the Local 880 ad (Tr. 110). Moreover, he learned "nothing specifically" with respect to the involvement of Hill's in the cancellation of Union ads by other stations (Tr. 115).

42. The Sharp Agency in March 1966, unsuccessfully tried to place advertising for Local 880 on Station WHHH, Warren, Ohio (Tr. 94). The station was carrying an average of 20 spots per week for Hill's (Tr. 165). There was no mention in the ads of the labor dispute (Tr. 175). The manager, Hardy, of WHHH, told Jack Sharp the station would run the proffered ad "subject to verification" of the issues mentioned in the copy (Tr. 170, 172). Hardy referred the matter to an attorney for WHHH who received no response from Hill's attorneys as to whether the stated issues were the actual issues in the dispute (Tr. 172). In this connection, Hardy testified: "We tried for 2 months to verify the copy. We did not hear from them. Nothing happened." (Tr. 172) In verification of the issues from an attorney for Local 880 was communicated to Hardy (Tr. 173). Counsel for WHHH advised against carrying the Union's ad since the copy had not been verified by Hill's, and the ad was not broadcast by this station (Tr. 172, 173). Hardy had no discussion with Moore nor with any other radio stations regarding the Local 880 advertising (Tr. 174).

43. Sharp also attempted to place advertising for Local 880 on Station WKST in Newcastle, Pennsylvania. According to Sharp, this station had a problem with verifying the information in the copy furnished it and the copy "just never got on the air" (Tr. 196). Another station with which Sharp sought to place Local 880 advertising was WKBN in Youngstown and was refused on the ground the issue between Hill's in Ashtabula and Local 880 "was not relevant to Youngstown." (Tr. 106–107)

44. Moore, whose advertising agency represented Hill's, conceded that he could have discussed with Hardy of Station WHHH, the content and legality of the copy the Union was attempting to have this station carry (Tr. 137). Moore, when asked whether he also

had spoken with a representative of Station WLEC, Sandusky, about the content of the Union's advertising, stated (Tr. 139): " I would say that I probably did." He admitted the possibility that he also raised the question of the "legality" of the Union's advertising in the sense of whether the advertising copy furnished by Local 880 was "factual" (Tr. 139). Moore testified further that he may have spoken to the manager of Station WWOW in Conneaut, Ohio, concerning the content of the Union copy (Tr. 140). While he had no evidence that there was any inaccuracy, it occurred to him that the copy might be inaccurate since, as he recalled, "it was rather strong copy" (Tr. 139). Moore had a conversation with a radio station representative in Youngstown in which he raised the same issue of the accuracy of the Union's copy (Tr. 140–41). It is Moore's testimony that Goldberger, president of Hill's, gave him no instructions or advice about bringing about the termination of Union advertising over WREO or any other station (Tr. 145). Moore, disavowing resort by him to financial inducements or coercive methods or improper influence being exercised upon a station, declared (Tr. 145): "If the copy is factual it is going to be aired and that's it." (Tr. 145)

45. Local 880 ran an advertisement in the *Ashtabula Star-Beacon* on February 25 and 26, 1966, publicizing a strike of the employees of Hill's store in Ashtabula, listing the unsettled issues in the dispute, and requesting that the public "respect the picket lines at Hill's Department Stores" (WREO Ex. 5, Tr. 251, 256). On April 15, 1966, a different advertisement on behalf of Local 880 appeared in the *Star-Beacon*. This ad disputed Hill's claims with respect to certain questions, and again requested that the Union's picket lines be respected (WREO Ex. 4, Tr. 244–46).

46. On April 4, 1966, Hill's published an advertisement in the *Star-Beacon*, captioned "An Open Letter To The Public", listing the benefits which the company had offered to its Ashtabula employees but which were not accepted and urging that the public continue to shop at Hill's (WREO Ex. 6).

47. On April 19, 1966, counsel for the Union sent a letter to WREO stating that he had lodged a complaint with the Commission as a result of the station's discontinuing commercial spots dealing with the Union's dispute with Hill's. Replying to this letter the WREO General Manager, Colin, commented on the station's action of April 5 informing Hill's and Local 880 that WREO would accept no further advertising from either party concerning the strike:

> The station management felt as a matter of policy we would have no further part in the controversy which was going on between the Union and Hill's Department Store. We felt we were being fair and impartial to both parties in this decision.

Also, Colin, after next stating the belief of the station that most of the matters concerning the strike were strictly between the Union and the company, offered "to allow representatives of Hill's and Local 880 to air their views together in a round table discussion over Radio Station WREO, at a time mutually agreeable between the parties and the radio station". (WREO Ex. 7).

48. On September 9, 1968, Colin, responding to a Commission inquiry for WREO, stated:

> WREO had carried about 322 of Local 880's announcements when it became apparent, from complaints of the public, that the continuous repetition of these partisan announcements had become an irritant to WREO's listening audience. The advertisements concerned a controversy in which the public and WREO were not a part of. (WREO Ex. 11, p. 1)

49. In answer to questions about Moore's conversation with Fassett, the September 9 letter declared:

> In our opinion, neither Hill's nor Mr. Moore sought to influence WREO and we did not interpret Mr. Moore's remarks as an attempt to influence WREO. WREO did not cancel Local 880's ads because of or as a result of Mr. Moore's remarks. (WREO Ex. 11, p. 2)

The letter added that the Moore-Fassett "meeting" mentioned in the Commission's inquiry was in fact "a telephone conversation instituted by Mr. Fassett in the course of a normal sales call."

50. In response to a written interrogatory of the Broadcast Bureau as to whether WREO has a policy regarding the discontinuance of advertising that is the subject of listener or advertiser complaints, station WREO replied that its policy had been stated in the September 9, 1968 letter (WREO Ex. 11). That letter stated, in part: ". . . During these years [since 1937] we afforded the public a service compatible with good taste and minimal irritation. . . . Our policy also has been to avoid airing private controversies since statements might be made of a possibly damaging nature to persons or businesses, and as a generality such controversies were of a private and not of a public interest." [15]

CONCLUSIONS

1. The issues in this proceeding require a determination initially whether Station WREO in Ashtabula, Ohio, ceased carrying advertisements on behalf of Retail Store Employees Local 880 concerning a labor dispute with Hill's Department Store in Ashtabula because of economic pressure.

2. The findings of fact reflect that in February and March, 1966, the Jack Sharp Advertising Agency, acting on behalf of Local 880, placed advertising with several radio stations in the northeastern Ohio area, including WREO. The ads publicized the strike of Local 880 members against Hill's Department Store in Ashtabula. Issues in the dispute were mentioned and listeners were requested to observe the picket line. Mr. Rowley, the president of WREO and a major stockholder, reviewed and approved the script of the proposed advertising, and Mr. Fassett, the station manager, then accepted an initial advertising contract with Local 880 for the placement of 28 spot announcements (7 per day), during the period of February 16 to February 19, 1966. There was no refusal of the Union's advertising on the ground that it involved a private controversy. Four additional contracts with Local 880 were signed by Fassett; these provided for 42 spots announcements of 60 seconds each for weekly periods between

[15] As has been already indicated, the September 9, 1968 letter asserted that the repetition of the Union's announcements had become an irritant to WREO's listeners, and that the ads concerned a dispute to which the public was not a party.

February 21 and March 19, 1966. The sixth contract between the station and the Union called for the carriage of 42 spots weekly, beginning March 20. Seven spots were to be aired daily, with the exception of 14 spots per day to be broadcast on April 1 and 2, 1966. Instead of specifying a termination date, the sixth contract, which was executed on March 18, contained a "Till Forbid" provision which permitted cancellation by either party on two day's notice.

3. About 25% of the script for the Union's ad was changed effective February 28, 1966. The revision originated with the Union, and WREO never suggested that the content, or frequency of the Union's advertising be varied from the proposals under the various contracts.

4. The findings further show that Hill's Department Store in Ashtabula was among the large advertisers of WREO in 1966.[16] Its advertisements urged the public to patronize the establishment and mentioned various items on sale but never referred to the dispute with Local 880. Richard R. Moore, president of the Smith Advertising Agency in Youngstown, handled the Hill's account and placed its advertising on WREO and other stations.

5. On April 4, 1966, discussion about the Local 880 ads between Mr. Rowley and John A. Colin, General Manager and General Counsel of WREO, resulted in the decision to terminate the Union's advertising over the station. They prepared a statement which advised both the Union and Hill's that "no further copy from either party concerning the strike" between these two parties would be accepted. The station manager delivered this message on April 5, 1966, over the telephone to the Sharp Agency and to Moore, advertising representative of Hill's. No reason for the station's action was given in the message, and Fassett did not elaborate on it when the Sharp agency questioned him about the station's decision. Since the contract required two days' notice for cancellation, the Union's ad was carried through April 7. Some 320 Union announcements were broadcast by WREO between February 16 and the April termination date.

6. Upon WREO's filing its 1967 application for renewal of license, Local 880 filed a petition to deny the WREO renewal. The Union alleged that WREO had ceased carrying its ads because of economic pressure from Hill's. In its efforts to ascertain the facts, the Commission requested information from WREO. In response to the Commission's inquiry, WREO submitted a letter dated March 20, 1968, acknowledging there had been a discussion between Mr. Moore of the Smith Advertising Agency, which represented Hill's, and Mr. Fassett, WREO's station manager, in which Moore "contended some of the ads of Union 880 were possibly illegal" (WREO Ex. 9, p. 11). In a further letter dated September 9, 1968, WREO stated:

> In our opinion, neither Hill's nor Mr. Moore sought to influence WREO and we did not interpret Mr. Moore's remarks as an attempt to influence WREO. WREO did not cancel Local 880's ads because of or as a result of Mr. Moore's remarks (WREO Ex. 11, p. 2).

7. In its Memorandum Opinion and Order released December 2, 1968 (14 RR 2d 780), the Commission concluded that there were no unresolved questions of fact, denied Local 880's Petition to Deny and granted WREO's renewal. It was pointed out by the Commission

[16] In 1966, WREO carried 1,337 spots and also 88 sponsored programs for Hill's.

that WREO has assigned as reasons for cancellation of Local 880's advertisements they were becoming irritating and offensive to its audience.

8. Following an appeal by Local 880, the United States Court of Appeals for the District of Columbia reversed and remanded this case for further inquiry into the question of improper influence by Hill's. The Commission accordingly designated this proceeding for hearing and afforded Local 880 an opportunity to submit evidence in support of its allegation that the station discontinued carriage of its announcements because of improper economic pressure. The hearing has been concluded, with all parties having been given the opportunity to submit evidence on the issue of economic pressure.

9. The record compiled in the hearing does not warrant the conclusion that WREO ceased carriage of Local 880's ads because of economic pressure. As noted above, WREO admitted in earlier correspondence to the Commission that, in the course of a routine sales call initiated by Mr. Fassett, the advertising representative for Hill's, Mr. Moore had raised with Fassett the legality of Local 880's ads. Moore's testimony is consistent with WREO's prior statements. He stated that in conversing with Fassett he questioned whether the station had reviewed the Local 880 copy to determine whether it was legal and factually accurate or might open the station to a lawsuit. As pointed out in the findings, Moore did not indicate to Fassett that he desired the Union ads be discontinued, or that Hill's was opposed to carriage of the ads, or that Hill's would discontinue its own advertising if further Local 880 ads were carried.

10. Moore's conversation with Fassett took place about March 31, 1966. No evidence has been adduced showing any further contacts with WREO by Moore or any official or employee of Hill's. The only tangible result of Moore's remarks to Fassett was that Mr. Colin, the General Counsel for WREO, when informed by Fassett of the conversation with Moore, reviewed the Local 880 ad for libelous matter. Colin reached the conclusion there was nothing in the ad on which to base a lawsuit against the station.

11. Colin told Mr. Rowley, the president of WREO, about Fassett's conversation with Moore. In a letter of September 9, 1968, to the Commission, Colin wrote for WREO that "we did not interpret Mr. Moore's remarks as an attempt to influence WREO." There is nothing in the record to contradict this statement or to cast doubt upon its truth. It is, of course, easy to conjecture that Moore's comments to Fassett were designed to bring pressure to bear upon WREO management, bearing in mind that Moore was the advertising representative of an important advertiser of the station. Similarly, one may readily choose to infer that WREO management understood Moore's remarks to carry the implied threat of application of economic sanction by Hill's if the Union's ads were not discontinued by the station. But the insuperable difficulty either of these views presents is the lack of any solid evidence in the record to offset the positive disavowals by WREO witnesses and Mr. Moore to the contrary. In this connection, it is significant that although Moore candidly admitted on the stand he personally desired Local 880's ads be discontinued "only if their content was not factually correct" nevertheless this hope was

not made known to Fassett by him. Moreover, it is conceded by Gary Sharp, who arranged for the broadcast of the Union's ads on WREO, that he personally had no information from which to infer that Hill's had communicated with that station concerning the Local 880 ads.

12. The evidence has disclosed that Mr. Herbert Goldberger, president of the Hill's organization, was aware that Local 880 ads concerning the controversy with Hill's store in Ashtabula were being carried on various stations. Advertising placed by Moore for Hill's required Goldberger's approval. Moore, whose office is in Youngstown, was in touch by telephone weekly with Goldberger in Boston. As indicated by Moore's testimony, Goldberger was concerned and upset about the Union's ads and told Moore the Union was wrong in urging the public to refrain from shopping at Hill's stores. Moore interpreted Goldberger's concern as an instruction to find out in which communities stations were carrying Local 880 ads and to raise questions with them as to whether the ads were factually accurate. Testimony by Moore establishes that he carried out the instruction.[17] While he had no information that the Union's advertising was inaccurate, Moore thought this might be so since, in his opinion, "it was rather strong copy". Even though Moore undertook to raise questions with stations carrying the Union's ads, he testified that he received no instructions or advice from Goldberger on effecting the termination of Union advertising on WREO or any other station. There is no evidence to the contrary in the record and there is no reason to doubt the veracity of this witness.

13. The findings reflect cancellation of Local 880's ads by radio stations other than WREO. On March 25, 1966, Station WLEC in Sandusky terminated by registered letter to the Sharp Agency, with no reason stated; on March 31, Station WWOW in Conneaut, after running the Union's ad for 30 days, cancelled, stating that review of station policy necessitated the action; and on March 22, 1966, Station WFMJ in Youngstown cancelled after one day, stating the Union's dispute with Hill's at Ashtabula was not relevant to Youngstown. The Union's advertising representative could offer no evidence that Hill's was involved in these cancellations. Moore admitted that he probably had spoken with a representative of WLEC about the Union's ad and that he may have spoken to the manager of Station WWOW in Conneaut. He recalled a conversation with a Youngstown station representative regarding accuracy of the Union's copy. But the record is devoid of evidence that he was influential in the determinations made by the three stations in question. It is noteworthy also that Rowley, president of WREO, was not aware of the cancellations by other stations when the decision to terminate the ads on the Ashtabula station was made. Nor does it appear from the record that anyone else connected with WREO knew of the cancellations elsewhere.

14. As has already been stated, Moore's conversation with WREO's station manager concerning Local 880's ads occurred about March 31 and the decision to terminate was made by WREO on April 4, 1966.

[17] Station WHHH, Warren, Ohio, did not broadcast the Union's ad upon advice of counsel, after unsuccessfully attempting to obtain verification of the strike issues from Hill's attorneys. While Moore testified he could have discussed the content and legality of the ad with WHHH, the station manager denied having any such discussion with Moore.

The short interval between these two events could conceivably give rise to the inference that they were causally related, especially since WREO did not specify any reason for the decision in its notification to the Union on April 5. Testimony by Rowley is inimical to the thesis that Moore's discussion with Fassett entered into the termination decision.[18] More importantly, the reasons for WREO's action spelled out convincingly in the hearing by Rowley and discussed in the findings above (Paras. 32 and 37), dispel the likelihood of any motivating connection between the antecedent Moore-Fassett conversation and cessation of carriage of Local 880's ads. As established by the testimony of WREO's president, the General Manager and the station manager, the broadcast of numerous Local 880 spot announcements commencing in mid-February of 1966 occasioned complaints which were voiced by listeners to these three persons. The complaints were unwritten and no record of them was kept. At the hearing only two persons were identified as complainants [19] and none of the three WREO witnesses could recall the number of complaints that came to his attention. Rowley and Colin agree that the complaints began in the forepart of March and Rowley's testimony indicates they were discussed between Colin and himself about a week before the Union's ads were discontinued.

15. When asked about the nature of these complaints, Rowley answered "that the advertising was irritating, it was repetitious, it was drumming at the community". When the Union's ads were increased to 14 daily on April 1 and 2, all with the same content, Rowley found this intolerable. He expressed himself thusly: ". . . it was my feeling that this had gone far enough, . . . this was a spot announcement that had been going on since the middle of February. This hammering at the public and I felt the public was being used. . . . We felt there was nothing new being presented and this kept up a very nagging and annoying situation." Rowley thought that the public had heard enough, particularly since listeners are ". . . locked into" a radio station but a newspaper reader can skip over any advertisement.

16. Other pertinent circumstances which Rowley took into account were the publication of Union ads in the local newspaper on February 25 and 26, and an advertisement in the same paper on behalf of Hill's on April 4.

17. Enough has been detailed above to demonstrate that WREO considered it had compelling reasons for discontinuance of the Union's advertising. These did not include the element of economic pressure from Hill's which reason has no support in the record. The Broadcast Bureau suggests the record appears to indicate, at the most, that WREO was "supersensitive to Moore's entreaty." The Examiner rejects this suggestion if it implies that WREO was in any degree moved to act adversely to the Union on account of Moore's discussion with Fassett. True it is that Moore's comments were not ignored—Fassett brought them to the attention of the General Manager who in turn told Rowley about them. Moreover, Colin, as General Counsel for WREO,

[18] Rowley expressed the belief at the hearing that there was no discussion on April 4 of the possible effect the continuation of the Local 880 ads would have on Hill's advertising with the station.

[19] Some five years elapsed between the time of airing Local 880 ads and the hearing.

reviewed the Local 880 ad for libelous matter. But, so far as appears from the record, that is where the matter of Moore's remarks ended.

18. Counsel for the Union points out that the statement of termination was read to Moore as well as to the Sharp Agency. He then comments: "Mr. Moore was being directly and promptly informed that his campaign had succeeded. If the cancellation were the mere coincidence that WREO would have us believe, it would have been none of Moore's business to know about it." The message read to Moore stated: "We have decided that we will accept no further copy from either party concerning the strike between Hill's and the Union." Colin has explained he wanted to be fair to both parties and to make sure the decision would apply equally to both the Union and Hill's. This is a plausible and reasonable justification for the notification to Moore when one takes into account that: (1) Hill's ran a full page ad in the Ashtabula daily newspaper on April 4 dealing with the labor dispute, and (2) Hill's might well resort to radio advertising to counter the Union's ads despite the fact it had not done so before April 4.

19. Station WREO's conduct with respect to Local 880's advertising is not beyond criticism. The proper discharge of its responsibilities as a broadcaster dictates that a contemporaneous record of complaints against Local 880's ads should have been compiled and that specific reasons for termination of the Union's advertising should have been stated in the April 5 notification. In the sensitive state of the ongoing labor dispute to which the Union was a party, the failure of WREO to apprise the Union of the grounds for denying further access to its facilities was bound to give rise to some suspicion as to what precisely precipitated the station's action. Thus, a decision founded on considerations weighed by WREO management was made to appear arbitrary to the affected advertiser and all the more so because its ads had been accepted by the station for more than six weeks without question. It has been suggested that WREO should have made recommendations to the advertiser with respect to varying the content of the Union's ads and their frequency. But Mr. Rowley has supplied a satisfactory answer by stating that since the Union's copy was presumably being prepared by an advertising agency it was capable of dealing with the various aspects of the presentation (Tr. 232–33). In any event, the above-noted valid criticism of WREO's conduct do not alter the conclusion that Local 880's ads were not discontinued because of economic pressure.

20. One can question the wisdom of Mr. Moore's approach to WREO and other stations as the advertising representative of Hill's. Granting the legitimacy of his concern for the interest of Hill's and his agency in the accuracy of the Union's copy, inasmuch as he had no information on this point to impart, any inquiry by him in this area could be misconstrued as to motive. Verification of the accuracy of the Union's advertising would have been more appropriately discussed with the Hill's organization than with the carrying radio stations. However, WREO did not interpret Moore's inquiry as pressure by Hill's and the record does not reflect that this inquiry caused WREO's decision.

21. Since it has been concluded that Station WREO did not cease carrying Local 880's ads because of economic pressure and since there is no evidence that WREO's decision was made in deference to Hill's

importance as an advertiser following Moore's discussion with Fassett, it is therefore concluded that a grant of the application for renewal of license of Station WREO would serve the public interest, convenience and necessity.

In view of the foregoing, IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Rules, the application of Radio Enterprises of Ohio, Inc. for renewal of license (File No. BR–950) of Station WREO, Ashtabula, Ohio, IS GRANTED.

ISADORE A. HONIG,
Hearing Examiner, Federal Communications Commission.

F.C.C. 73-68

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF RADIO KACI, INC., LICENSEE OF RADIO STATION KACI, THE DALLES, OREG.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 22, 1973)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated January 5, 1971, addressed to KACI, Inc., licensee of Radio Station KACI, The Dalles, Oregon, and (2) licensee's responses to the Notice of Apparent Liability dated February 7 and 8, 1971.

2. Station KACI is authorized to operate during presunrise hours with power of 500 watts, from 6:00 a.m. local time until 7:45 a.m. in January, until 7:15 a.m. in February, and until 6:15 a.m. in March, Pacific Standard Time. The Notice of Apparent Liability for forfeiture in the amount of two thousand dollars ($2,000) was issued by reason of licensee's willful or repeated failure to observe the terms of its station authorization and willful or repeated violation of Section 73.52(a) of the Rules of the Commission, in that the station was operated with power in excess of that authorized on dates and at times as follows with power and excesses as indicated:

Date (1971)	Log entries (a.m.)	Power (watts)	Excess (percent)
Jan. 17	6:45, 7:15	546	9
19	6:00, 6:15, 6:45, 7:15	546	9
20	6:00, 6:15, 6:45	546	9
20	7:15	1028	105
22	6:00, 6:15, 6:45, 7:15	546	9
25	6:45, 7:15	546	9
27	6:00, 6:15, 6:45, 7:15	546	9
28	6:45	546	9
28	7:15	587	17
29	6:00	1065	113
29	6:30	1072	114
29	7:00, 7:30	1052	110
30	6:00, 6:30, 7:00, 7:30	1082	116
Feb. 7	7:00	816	63
14	7:00	840	68
20	6:00, 6:15, 6:45	1000	100
Mar. 12	6:00	587	17
13	6:00	587	17

3. In response to the Notice of Apparent Liability, licensee states that its station manager, who was responsible for technical operations, was replaced at the end of January, 1971 because of recurring prob-

lems, that it experienced difficulties in controlling its presunrise power, but believed corrective action had been taken, and that licensee's new station manager ultimately solved the problem after the inspection. Licensee's response was accompanied by a letter from its counsel urging a reduction in the amount of forfeiture and citing cases in which the Commission imposed lesser forfeitures for violation of the same Rules.

4. A review of the cited cases shows that the lower fines were determined therein because of certain factors which are not present in the instant case, e.g., inferior financial conditions or lower excesses of power in the cited cases compared with the station's economic condition and its higher excesses of power in the instant case. The duration of the violation was longer in some of the cited cases, but this factor alone does not appear to be critical, considering the fact that in all of the cases, including the instant one, the violations were of a sufficient duration to indicate inadequate supervision of station operations and create danger of interference to other stations over a substantial period of time. In this light the amount of forfeiture in this proceeding is consonant with our previous decisions. Licensee's response also indicates that it had problems with its power change system, which was faulty at the time of inspection, and that licensee had been working on this defect prior to inspection during the three months in which the violations occurred.

5. We have considered licensee's responses and the circumstances of this case, but we are not persuaded to remit or reduce the forfeiture.

6. The licensee repeatedly failed to abide by the provisions of its station authorization and violated Section 73.52(a) of the Commission's Rules in operating with excessive power as indicated herein. Since we have determined that the violations were repeated we find it unnecessary under the Communications Act of 1934, as amended, to make an additional determination as to whether the violations were willful. *Paul A. Stewart*, FCC 63–410, 25 RR 375 (1963).

7. In view of the foregoing, IT IS ORDERED, That KACI Radio, Inc., licensee of Radio Station KACI, The Dalles, Oregon, FORFEIT to the United States the sum of two thousand dollars ($2,000) for repeated failure to abide by the provisions of the station authorization for KACI and violation of Section 73.52(a) of the Rules of the Commission. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of receipt of this Memorandum Opinion and Order.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Radio KACI, Inc., licensee of KACI, The Dalles, Oregon.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–45

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 73 OF THE COMMISSION'S RULES AND REGULATIONS WITH RESPECT TO USE OF REMOTE INDICATING PHASE MONITORS AND THE INSPECTION REQUIREMENTS FOR REMOTELY CONTROLLED DIRECTIONAL STATIONS	Docket No. 18455 RM–1098

REPORT AND ORDER

(Adopted January 10, 1973; Released January 18, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE CONCURRING AND ISSUING A STATEMENT; COMMISSIONER HOOKS ABSENT.

1. In response to a petition filed by the National Association of Broadcasters (NAB), the Commission by a Notice of Proposed Rule Making, released February 28, 1969, initiated this proceeding, which contemplates the amendment of subparagraphs (a)(5) and (a)(6) of Section 73.67 of the rules governing the operation by remote control of standard broadcast stations utilizing directional antennas, as follows (the underlined material would be added to the existing text):

> (5) The indications at the remote control point of the antenna current meter, or, for directional antennas, the common point meter and the remote base current meters shall be read and entered in the operating log each half hour. *If a station employs a phase monitor providing phase and loop current indications at the remote control point, these indications shall also be read and entered in the operating log each half hour, Provided, however, that the phase monitor employed is of a type approved by the Commission for providing such remote indications.*
>
> (6) The indications at the transmitter, if the station employs a directional antenna, of the common point current, base currents, phase monitor sample loop currents and phase indications shall be read and entered in the operating log once each day for such pattern. These readings must be made within two hours after the commencement of operation for each pattern, *Provided, however, that stations reading and logging phase monitor indications at the remote control point need only make readings and entries of indication at the transmitter once each day (for any directional pattern), regardless of any condition on the license which may require more frequent readings. However, no more than 48 hours shall elapse between successive readings at the transmitter for a given mode of directional operation.*

2. The effect of these rule amendments would be to relieve operators of a station employing more than one directional radiation pattern of the necessity for making more than one set of readings at the transmitter each day if the station employs a phase monitor type approved for its capability for providing phase indications at a remote control point, and such indications are in fact read and logged at that point.

3. The substance and effect of the amendments is generally in accord with NAB's proposals, with the exception that we proposed to permit the remote logging of phases only with suitable type approved monitors, a restriction not suggested by NAB. We noted that the great majority of existing monitors can be used for remote phase indications, if at all, only after extensive alteration, and the only assurance that accurate and reliable indications would be provided at a remote control point rested in a requirement that a monitor be employed which the Commission has established as acceptable for this purpose through the type approval procedure.

4. In a separate proceeding (Docket 18471) we proposed rules governing the type acceptance of phase monitors.

5. Our Notice of Proposed Rule Making herein set April 7, 1969, as the deadline for filing comments, and April 17, 1969, for filing reply comments. These dates were extended by subsequent orders to July 9, 1969, and August 8, 1969, respectively.

6. Twenty-seven comments by twenty-six parties were filed, and one reply comment. These parties are:

Wolf Broadcasting Corporation (WFRO)
American Broadcasting Companies, Inc. (ABC)
Kear and Kennedy (Kear)
Newhouse Broadcasting Corp. (Newhouse)
McClatchy Newspapers (McClatchy)
J.G. Rountree (Rountree)
KFXM Broadcasting Company (KFXM)
Storer Broadcasting Company (Storer)
The Association of Federal Communications Consulting Engineers (AFCCE)
John K. Birch (Birch)
A. Earl Cullum, Jr. and Associates (Cullum)
Walter F. Kean (2 filings) (Kean)
The McLendon Corporation (McLendon)
National Association of Broadcasters (NAB)
National Broadcasting Company, Inc. (NBC)
Badger Broadcasting Co. (WIBA)
Ralph J. Bitzer (Bitzer)
James A. Noe (Noe)
Mobil Video Tapes, Inc. (MVT, Inc.)
United Broadcasting Co. of New York, Inc. (UBC)
WEEU Broadcasting Co. (WEEU)
Association on Broadcasting Standards, Inc. (ABS)
Columbia Broadcasting System, Inc. (CBS)
Defense Electronics (DE)
Frank S. Colligan (Colligan)
Department of Education of Puerto Rico (reply comment)

7. All pleadings have been carefully considered. The parties agree that the reading and logging of phase indications at a remote control point should be permitted, if a phase monitor type approved for providing such indications is utilized. There is general agreement that with such facilities available, the present requirements for the reading and logging of indications of various parameters at the transmitter can be relaxed. However, there is a considerable difference of opinion as to the extent and terms of this relaxation.

8. The proposed rules stipulate that no longer than 48 hours may elapse between successive meter readings of the transmitter for a given directional pattern. Several of those commenting suggest that this interval should be somewhat further extended to provide greater flexibility for the licensee in scheduling and making the required readings at the transmitter. McClatchy and Kean suggest 50 hours in lieu of 48, Rountree 52 hours, AFCCE and CBS, 54 hours, while NBC and Noe urge that transmitter readings for a given mode of directional operation be made "at least every other day" (NBC) or "at intervals of not less than every second day" (Noe). On the other hand, DE states that in no case should more than 48 hours elapse "between inspections, and thus local readings". Furthermore, says DE, each licensee should be required to perform daily inspections for each pattern for some period of time after initiating remote operation. Noe suggests that if phases are read at the remote control point, the interval between times of logging these and other parameters should be increased from one-half hour to one hour.

9. Rountree notes that the Commission has interpreted 73.67(a)(6) as not to require readings at the transmitter for any particular mode of directional operation which endures for a period of less than one hour, and requests that this interpretation be specifically reflected in the amended rules. He further believes that the application of the proposed rules to an operation involving only a single directional pattern is unclear. CBS suggests that if, in instances where two directional patterns are employed, it is feasible to reduce the frequency with which transmitter readings must be made to once every second day for each pattern, a station employing a single directional pattern should be required to log readings at the transmitter no more often than on alternate days.

10. If a directional antenna system has a record of proven stability and operates well within the required tolerance, Cullum and Storer state that weekly checks at the transmitter should be adequate. Birch also supports weekly transmitter readings in conjunction with the maintenance log requirements of § 73.114(a)(1)(i), and at the same time, would require checks of the calibration adjustments of the phase monitor.

11. UBC and WEEU suggest that when phases are read and logged at the remote control point, logging of indications at the transmitter should be necessary no more than 5 days per week (apparently to parallel the maintenance inspection schedule prescribed in § 73.93(j)). On the other hand, CBS is of the opinion that daily maintenance inspections are not necessary, and urges that any requirements for the logging of meter readings at the transmitter for pattern maintenance

not be associated with the requirements for routine maintenance inspections.[1]

12. ABC believes it unnecessary to make daily base current readings at the transmitter if loop currents are read at the remote control point. ABS urges that the base current reading requirement be abolished where phase monitor loop sample currents are read remotely. However, a condition precedent to such abolition would be some standardization in the design and placement of the sampling loop circuits. Kear and Kennedy also emphasize the necessity for proper sampling circuits if loop currents are to be relied on in lieu of base currents. There is rather general agreement that if the station license permits the logging of phase monitor sample currents in lieu of remote base currents at the transmitter, the same latitude should be permitted at the remote control point, and, to the extent the proposed rule requires that both phase monitor current indications and base current indications be logged at the remote control point, it should be modified to require only one or the other, but not both.

13. A number of licensees who indicate that they are presently reading and logging loop current indications at their remote control locations, as "indications . . . of . . . remote base current meters" seek assurances they will not be required to install type approved phase monitors to continue this practice. It is also urged that if current indications of a type approved phase monitor are read and logged at the remote control point, it should be unnecessary to also read and log indications of base current, as the proposed rule would require.

14. ABC states its experience with the transmission of phase monitor indications to a remote control point indicates that serious errors may be experienced over a remote control system using telephone lines and direct current metering, and it found it necessary to utilize a tone telemetry system to minimize such errors. Storer also questions the feasibility of transmitting indications of small phase differences over DC systems because the extremely low voltages corresponding to such differences may be affected by induced potentials in the telephone metering lines.

15. Storer states, however, that there should be no difficulty in transmitting accurate indications, even from a precision phase monitor, if an adequate telemetry system is employed. It noted there is at least one type of precision monitor with facilities for remote indication.

16. Storer urges that we specify the procedure to be followed by a station licensee in replacing an existing phase monitor by a type approved monitor providing remote indications.

17. Cullum, ABS and CBS all urge that we provide in this proceeding for the use of limit alarms for phase and loop current indications. With such alarms, they state, it should be feasible to reduce greatly the frequency with which these indications are observed and logged. CBS proposes a modification of the proposed amendment of § 73.67 (a)(5) which would permit the logging of phase and sample current indications at four hour intervals, if limit alarms are installed.

[1] In its Order *In the Matter of Re-regulation of Radio and Television Broadcasting*, adopted November 1, 1972 (FCC 72-967), the Commission amended 73.93(j) so as to require transmitter inspections only once each week, with no less than 5 days between successive inspections.

DISCUSSION

18. If facilities are provided at the remote control point for monitoring phases and current ratios, in addition to the parameters specified in present § 73.67(a)(5), there is available to the operator at that point essentially all of the information concerning the functioning of the directional array which he would have if stationed at the transmitter. However, the indications read at the remote control point have accuracy and reliability comparable to indications observed at the transmitter only if an adequate telemetry system is employed, and the indicating instruments at the remote control point are maintained in accurate calibration.

19. The Commission does not prescribe more than the barest requirements for remote control systems, and relies on the judgment and diligence of station licensees to insure that the remote indicating and control facilities are fully adequate. Under such circumstances, while we are of the opinion that observations at the transmitter may be lessened in frequency in general accordance with the proposed rules, we are unable to agree with those parties who suggest that the provision of phase indications at the remote control point justifies a reduction in the schedule of readings at the transmitter to once a week.

20. With respect to the other relaxations requested, we agree that there is no necessity for observing and logging readings at the transmitter for any particular radiation pattern within a precise 48 hour interval, and realize such a strict limit may impose some hardship on licensees in scheduling transmitter visits. We are also impressed by the argument that when phase indications are read and logged at a remote control point, if it is feasible to reduce the frequency of transmitter readings for each mode of directional operation for a station utilizing two directional patterns, comparable relief should be afforded a station operating at all times with the same directional pattern (that is, DA–1). We further believe that a station operating nondirectionally daytime, and with a directional pattern at night (DA–N) merits the same consideration. Therefore, the rule amendments which we are adopting require readings at the transmitter every second day for each directional pattern, with no more than 54 hours elapsing between successive readings at the transmitter for each pattern. Of course, under such circumstances base currents need be read only in connection with other readings required at the transmitter. The amended rules permit this, even though a station license may require more frequent readings of base currents.

21. While, for remote control operation, we do not provide the full relief sought by UBC and WEEU—that transmitter readings not be required more than five days a week—we have afforded considerably increased flexibility even for a station with two radiation patterns. If the licensee wishes to schedule the times of transmitter visits so that readings for each pattern are made on the same day, he may omit transmitter readings on the next day. For a station using a single directional pattern, as much as 54 hours may elapse between the times readings are made at the transmitter.

22. We also are acting on Rountree's suggestion that since the Commission has interpreted the present rule as not to require readings at

the transmitter for a period of operation in any directional mode of less than an hour in duration, the rule be amended to specifically provide for this relief.

23. Concerning the question as to what "current indications" must be read at the remote control point we would first observe that while subparagraph (a) (5) of Section 73.67, as now written, requires that "indications . . . of . . . remote base current meters shall be read and entered in the operating log . . ." the Commission has permitted phase monitor sample currents to be read and logged in satisfaction of this requirement if the station license permits sample currents to be read in lieu of base currents. However, under such circumstances the samples for the remote point are not "provided by the phase monitor" but are extracted from the sample lines feeding the phase monitor by such means that the accuracy of indication of the phase monitor is unaffected. This expedient has been required inasmuch as the majority of the older phase monitors do not include provisions for remote current indication, and the Commission wishes to discourage any attempt to alter a phase monitor to provide this capability, on the theory that its performance might be adversely affected by such alteration.

24. Modern phase monitors of designs eligible for type approval incorporate outputs suitable for remote current indication. Where such a phase monitor is employed, it offers a more convenient, less cumbersome, and probably more accurate means for providing current indications to a remote control point than methods requiring the extraction of currents for remote indication from sampling lines intended primarily to provide input currents for the phase monitor.

25. We agree with those parties who contend that, for directional antenna systems, it should be unnecessary to read and log at a remote control point more than one set of indications of relative tower current amplitudes. So, in the amended rules which we adopt, a licensee is given the option of reading and logging at the remote control point either (1) remote base current indications, (2) indications of currents extracted from phase monitor sample lines, or (3) if he has a type approved phase monitor, current indications provided by the phase monitor.

26. Under the provisions of the amended rules, where tower current indications are presently being provided to a remote control point by acceptable means, and are read and logged at the remote control point, this practice may be continued. However, if a licensee at its remote control point proposes to read and log phase relationships and/or current indications obtained from the output of a phase monitor, a type approved instrument ordinarily will be necessary. We believe that the rules, as revised, satisfy the objections of those who alleged that the rule, as originally proposed, would require them to install type approved monitors in order to continue reading indications of currents obtained from phase monitor sampling lines.

27. We particularly note that ABC and Storer question the feasibility of accurately and reliably transmitting phase monitor indications over a remote control system employing DC metering. ABC experienced serious errors in attempting to do this, and installed a tone telemetry system at KQV to achieve satisfactory operation. Storer points out that the extremely low voltages associated with indications

of small phase differences may be affected by DC offset voltages induced in the telemetry lines by neighboring telephone circuits, thus producing erroneous readings.[2]

28. As emphasized in paragraph 19, above, the Commission does not prescribe engineering standards for remote control systems, but places on each licensee operating by remote control the burden of providing a system by which effective and reliable control of its transmitter is achieved and accurate indications of transmitter operating conditions are made available to the operator at the remote control point. Thus, if a licensee, pursuant to the amended rules, undertakes to read phase indications at a remote control point, it is expected that such changes will be made in the remote telemetry system as are found necessary to insure that the phase indications of the station monitor are accurately reproduced at its remote control point.

29. We note Storer's request that we specify a procedure to be followed when a licensee elects to replace an existing phase monitor with one approved for providing remote phase indications. We agree that it is desirable to establish such a procedure by rule, and have done so in paragraph (c) of new Section 73.69, which is adopted contemporaneously in Docket 18741.

30. We are adopting Birch's suggestion that Section 73.114 be amended to provide for a weekly entry in the maintenance log indicating that the calibration of the phase monitor has been checked. The calibration involves, in the types of phase monitors under consideration, the checking and readjustment, if necessary, of the zero and 180 degree points of the phase indicating meter. Calibration at weekly intervals is expected to be sufficient to maintain the required degree of repeatability.

31. We are also taking this opportunity to amend Section 73.114 to require specifically the calibration of indicating instruments at a remote control point at weekly intervals. While we believe that this practice is generally followed by licensees operating by remote control, and is in general conformity with the requirements of § 73.39 regarding the calibration of remote reading instruments, there has been heretofore no unambiguous requirement for calibration of indicating instruments at a remote control point.

32. In the amendment of § 73.67 (a) (5) proposed by NAB, and in the somewhat modified version of its proposal offered for comment by the Commission, phase indications, if they are provided at the remote control point would be read and entered in the operating log at successive intervals corresponding to those prescribed for the logging of other operating parameters in the rules as it existed at the time this proceeding was begun, namely, once each half hour. Various parties urged that such frequent entries in the log were unnecessary and burdensome, and made various suggestions for the lengthening of the interval between successive entries.

33. Substantial relief recently has been provided in this area by the adoption, on November 1, 1972, of an Order, *In the Matter of Re-regu-*

[2] Storer suggests that close-to-zero phase indications may be avoided by introducing additional phase shift in the sample line from the tower presenting the sensitive indication. Assuming that the condition for maximum stability of phase monitor indications is one in which equal amounts of phase shift occur in all sample lines, employment of this expedient, if it destroys such an equality, is, per se, undesirable.

lation of Radio and Television Broadcasting. (FCC 72–967), which, among other things, amends §§ 73.113(a)(3) and 73.67(a)(5) to such effect as to lengthen the interval between successive entries of parameters in the operating log at the remote control point from one-half hour to three hours. In the rule amendments adopted herein we, of course, have incorporated this change, and have specified the same schedule for the logging of phase indications at the remote control point.

34. In the light of this relaxation in the logging requirements for stations with directional antennas operating by remote control, little justification remains for maintaining a more demanding requirement for such stations when not so operated. Heretofore, this requirement, which specifies the observation and logging of phase indications and remote base currents or sample currents once each hour, has not been contained in our rules, but is set forth in each station's instrument of authorization. In the amendment of § 73.113, as described below, we now establish, by rule, a three hour schedule for entry of these parameters in the operating log, which will take precedence over the schedule specified in current instruments of authorization. It is anticipated that when licenses are renewed, such logging schedules will be deleted, and reliance will be placed on the rules to provide guidance in this matter.

35. In our Notice of Proposed Rule Making in this proceeding we stated that if Section 73.67(a)(5) and (a)(6) were amended it would be necessary, at the least, to make corresponding amendments in those portions of Section 72.113 (Operating Log) dealing with remote control operation. We further indicated our belief that the substance of (a)(5) and (a)(6) of Section 73.67 might, in any event, be more appropriately situated in Section 73.113 than at its present location, and that we would give consideration to such a change once we had decided on the changes to be made in the logging requirements for remote control operation.

36. In the amendments to the rules which we are adopting we are deleting (a)(5) and (a)(6) of § 73.67, and transferring the substance of (a)(5), as amended to Section 73.113 (Operating Log), as we had contemplated. However, the amended substance of (a)(6) is placed in Section 73.114 (Maintenance Log).

37. In determining on the specific form of the rule amendments at this time, our decision has been influenced by the intervening adoption, in Docket 18930, of amendments to 73.93, that section of the rules governing radio operators at standard broadcast stations. Pursuant to these amended rules, other than first class operators under certain circumstances may be utilized for routine transmitter duty at stations having directional antennas. Since the duty operator is normally responsible for the entries required in the operating log, the amendment of 73.93, without a corrective amendment of 73.113 would have created a situation where a lesser grade operator would have been permitted or required to make the periodic observations at the transmitter required when a station is operated by remote control—obviously a function which should be performed by a first class radiotelephone operator. At the time amended 73.93 was adopted, this matter was resolved temporarily by a contemporaneous amendment of 73.113(a), to reserve such observations for the first class operator.

38. Our permanent solution for this problem is to require that all observations at the transmitter attendant to remote control operation be entered in the maintenance log (Section 73.114), rather than in the operating log, and to make explicit what has heretofore been implicit, that entries in this log, and the observations or maintenance procedures which they reflect, are in the sole province of a first class radiotelephone operator. At the same time, we are including in the maintenance log a general schedule for readings of the base currents in the elements of directional antennas. Until the recent amendment of § 73.93 (see 73.93(e)(3)), we have specified in our rules no requirements for such readings, but consistently have included them in the instrument of authorization for each station. Generally, daily (seven times a week) readings for each directional radiation pattern have been required. In a few cases, on the basis of special showings by licensees, the Commission has authorized base current observations at less frequent intervals.

39. By including the base current observation requirement in Section 73.114 of our rules, we will obviate the necessity for including it in each station authorization. At the same time, we are reducing the frequency of observations for all directional stations (other than those operating by remote control, or those whose authorizations now specify observations at longer than daily intervals) from daily to 5 times a week, for each pattern, and have specified the observations to be made and the information to be recorded to be in accord with the substance of § 73.93(e)(3). Having done this, we are deleting this requirement from § 73.93, where it will no longer serve a useful purpose. The only additional burden placed on licensees, in general, is that involved in meeting the specific requirement that deviations of the ratios of the observed currents from licensed values be computed and recorded. However, it seems obvious that such computations must be made, in any event, if compliance with § 73.52(b) of the rules is to be assured; thus the actual burden imposed would appear to be minimal, or non-existent. Particularly in the case of stations operating by remote control, we expect that licensees will find it is more convenient to enter these readings in the maintenance log than in the operating log. However, since both logs will henceforth be required to give the Commission a complete picture of the technical operation of the station, we expect to modify Section II of FCC Form 303, the application for renewal of station license, to require the submission of the maintenance log, in addition to the operating log for the composite week.

40. Finally, we call attention to the fact that this proceeding from its inception, in various aspects, has been concerned with an instrument designated as a "phase" monitor. Comments and reply comments generally referred to the instrument by this name, and we employed this appellation in our discussion of the issues involved. However, most "phase" monitors include facilities for indicating the relative amplitudes of the RF signals applied to their input terminals, and monitors type approved by the Commission must include such facilities. Therefore, we have decided to follow the practice which has now become rather general, and henceforth designate an instrument designed to monitor the relative phases and amplitudes of the currents in the

elements of a directional array as an "antenna" monitor. This term has been employed throughout the appended rules.

41. The rules adopted herein, we believe, provide a substantial degree of relief from certain of the requirements for the surveillance of standard broadcast stations with directional antennas, and are consistent with our current efforts toward the re-regulation of radio and television broadcasting. As our studies in this field progress, if further relaxation of these rules appear appropriate and feasible, they will be adopted.

42. Accordingly, IT IS ORDERED, That, effective April 20, 1973, Part 73 of the Rules and Regulations IS AMENDED as set forth in the Appendix hereto. Authority for this action is found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

43. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

1. In § 73.67, subparagraphs (5) and (6) of paragraph (a) are deleted.
2. In § 73.113, paragraph (a) is amended to read as follows:

§ 73.113 Operating log.

(a) Entries shall be made in the operating log either manually by a properly licensed operator in actual charge of the transmitting apparatus, or by automatic devices meeting the requirements of paragraph (b) of this section. Indications of operating parameters shall be logged prior to any adjustment of the equipment. Where adjustments are made to restore parameters to their proper operating values, the corrected indications shall be logged, accompanied, if any parameter deviation was beyond a prescribed tolerance, by a notation describing the nature of the corrective action. Indications of all parameters whose values are affected by modulation of the carrier shall be read without modulation. The actual time of observation shall be included in each log entry. The operating log shall include the following information:

(1) For all stations:

(i) Entries of the time the station begins to supply power to the antenna and the time it ceases to do so.

(ii) Entries required by § 17.49(a), (b), and (c) of this chapter concerning daily observations of tower lights.

(iii) Any entries not specifically required in this section, but required by the instrument of authorization or elsewhere in this part. See, particularly, the additional entries required by § 73.51(e)(2), when power is being determined by the indirect method.

(iv) The following indications shall be entered in the operating log at the time of commencement of operation, and, thereafter, at successive intervals not exceeding three hours in duration.

(A) Total plate voltage and total plate current of the last radio stage.

(B) Frequency monitor reading.

(C) Antenna current or remote antenna current (for non-directional operation); common point current or remote common point current (for directional operation).

(2) For stations with directional antennas not operated by remote control the following indications in addition to those specified in (1), above, shall be read and entered in the operating log at the time of commencement of operation, and, thereafter, at successive intervals not exceeding three hours in duration. (This schedule shall apply, regardless of any provision in the station instrument of authorization requiring more frequent log entries.)

(i) Phase indications.

(ii) Remote antenna base current or antenna monitor sample current or current ratio indications.

(3) For stations with directional antennas operated by remote control, the following indications in addition to those specified in (1), above shall be read and entered in the operating log at the time of commencement of operation and thereafter, at successive intervals not exceeding three hours in duration. (This schedule shall apply, regardless of any provision in the station instrument of authorization requiring more frequent log entries.)

(i) Either remote indications of base currents, or currents extracted from antenna monitor sampling lines, or current indications or their ratios provided by a type approved antenna monitor.

(ii) Phase indications, if provided by a type approved antenna monitor.

* * * * * * *

3. Section 73.114 is amended by adding new subparagraphs (a)(1)(v)–(vi), (a)(2)(vii), (6), (7), (8), and (9).

§ 73.114 Maintenance log.

(a) All entries in the maintenance log specified hereunder shall be made by the holder of a first class radiotelephone license, and shall reflect the results of maintenance procedures or of observations performed by him.

(1) An entry each week of the following shall be made where applicable.

* * * * * * *

(v) A notation of the calibration check of the antenna monitor.

(vi) A notation of the calibration check of indicating instruments at each remote control point against the instruments at the transmitter.

(2) * * *

(vii) Antenna monitor.

* * * * * * *

(6) If required by the station authorization or Section 73.93(e)(5), the results of field strength measurements at the monitoring points specified in the station authorization.

(7) If a remote antenna ammeter normally employed to provide indications of antenna or common point current for entry in the operating log (see § 73.113) becomes defective, entries once each day, for each mode of operation, of such antenna or common point current, until such time as the defective remote antenna ammeter is repaired or replaced.

(8) For stations with directional antennas, in addition to those entries of operating parameters required in the operating log (see § 73.113), specific entries shall be made in the maintenance log, based on observations made without modulation, if instrument readings are affected by modulation. The date and time of each observation shall be shown. The schedule for making such observations and entries is set forth in subparagraph (9) of this paragraph. The entries are as follows:

(i) Common point current.

(ii) Base currents, their ratios, and the deviation of those ratios, in percent, from the licensed values.

(iii) Remote base current or sample current indications, the computed or indicated ratios of those currents, and the deviation of such ratios, in percent, from values specified in the license.

(iv) Phase indications.

(9) The entries in subparagraph (8) shall be made pursuant to the following schedule:

(i) For stations not operated by remote control, entries shall be made once each day, five days of each week, for each directional radiation pattern, regardless of any provision in the station authorization for more frequent entries *provided that*, if a first class radiotelephone operator is on duty at the transmitter for all periods of operation with a directional radiation pattern, and the station authorization permits antenna base current readings at less frequent intervals than specified in this subparagraph, entries may be made pursuant to the schedule specified in that authorization.

(ii) For stations operated by remote control, where phase indications are not observed and entered in the operating log at the remote control point, the entries specified in subparagraph (8) shall be based on observations made at the transmitter not more than 2 hours after the time of commencement of operation with each directional radiation pattern, *provided that*, if any separate period of

operation with a specific pattern does not exceed one hour in duration, observations and entries for such period need not be made. If a station utilizes a single directional radiation pattern during all hours of operation, observations and entries shall be made once each day, with no fewer than 12 hours elapsing between successive observations.

(iii) For stations operated by remote control, where phase indications, provided by a type approved antenna monitor, are observed and entered in the operating log at the remote control point, the entries specified in subparagraph (8) shall be based on observations made at the transmitter every second day for each directional radiation pattern, with no longer than 54 hours elapsing between successive observations for the same pattern. (This schedule shall apply, regardless of any provision in the station authorization requiring more frequent observations.)

CONCURRING STATEMENT OF COMMISSIONER H. REX LEE

I concur in the Commission's decision in this matter only because it provides the broadcaster with some degree of additional relief from our present technical operating requirements. However, it falls short of the action that I believe should have been taken.

On April 6, 1972, the Commission announced that it was undertaking a comprehensive study looking toward the re-regulation of radio and television broadcasting. In its Order In the Matter of Re-regulation of Radio and Television Broadcasting, adopted November 1, 1972 (FCC 72-967), the Commission provided for a number of changes in operating requirements, including the amendment of Section 73.93 (j) so as to require transmitter inspection only once each week, and of Sections 73.113(a) (3) and 73.67(a) (5) so as to lengthen the interval between successive entries of parameters in the operating log at the remote control point from one-half hour to three hours.

While these were welcomed changes for many stations, they did not alleviate the necessity for directionalized stations operated by remote control to make daily or twice-daily readings at the transmitter site. Today's action is intended to reduce, at least to some extent, the required frequency of visitation to the transmitter site for these type stations. If the licensee provides a type-approved antenna monitor, properly installed, required readings at the transmitter may be reduced from a once or twice-daily basis to once every 48 to 54 hours, depending on whether the station operates with one or two directional modes.

I recognize that a limited number of AM stations have been authorized to operate with complex directional antenna systems that may require special consideration. However, I do not see the merit or justification in continuing to impose the same stringent technical requirements on all directionalized stations merely in an attempt to insure compliance by these few. Several parties (Cullum and Storer) have stated that if a directional antenna system has a record of proven stability and operates well within the required tolerance, weekly checks at the transmitter should be adequate.

Today we provide for the use of a type-approved antenna monitor and establish a requirement for weekly calibration checks on this instrument and for the indicating instruments at the remote control point. If technology has progressed sufficiently to rely on weekly calibration of required instrumentation, then why only partially relax

the requirement for transmitter visitation to once every 48 to 54 hours when weekly observations and readings at the transmitter would suffice? Further relaxation in this regard would have eased the burden on the broadcaster and would have verified our commitment to a program of realistic re-regulation.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re complaint by
CASEY H. FORBES, SPRINGDALE, ARK.
Concerning Section 315, political broadcast Re Northwest Arkansas Broadcasting & Telecasting Co., Radio Station KBRS

JANUARY 15, 1973.

NORTHWEST ARKANSAS BROADCASTING AND TELECASTING CO.,
Radio Station KBRS,
Post Office Box 47,
Springdale, AR 72764.

GENTLEMEN: This is in reference to the complaint of Casey H. Forbes concerning the operation of your station. Mr. Forbes has alleged that you refused to sell him a specific block of time that you later sold to his opponent, Mr. Park Phillips, and that you broadcast endorsements of a slate of candidates, including Mr. Phillips, on the day of the election, without sufficient notification to those candidates not endorsed. Mr. Forbes was a candidate for mayor of Springdale in the November 1970 election for that office.

Specifically, Mr. Forbes states:

> I made specific request of Mr. Curtis Horner, Sales-manager, in the office of KBRS sometime during the 1st week of September, 1970 for the last one hour of the day November 2, 1970 (11:00 p.m. to midnight) on day preceding election. I was told by Mr. Horner that the regular program which had been on the station for a number of months would not be pre-empted for anyone. I asked him specifically if my opponent would be given any of that time if he asked for it, and he replied that the program would not be pre-empted for any candidate. Mr. Horner then told me that the one-half hour preceding [the Savings & Loan program, which begins at 7:00 p.m.] was available. I bought and paid for the time at that moment, stating that I wanted to reserve for my campaigns the last available time on that evening and was assured by Mr. Horner that I had bought it. He gave me a receipt for approximately $18.00 for the one-half hour's time purchased.

You have responded to the complaint by stating that Mr. Forbes was told, on October 2, 1970, when he purchased the time from 6:30 to 7:00 p.m. on November 2 that "the period from 7:00 p.m. to midnight on that date was fully sold." You state that the agency handling the advertising for Mr. Phillips also handled the account for "one of the participating sponsors during the 7:00 to 8:00 p.m. time period on November 2" and that on October 28 the agency learned of Mr. Forbes' broadcast and requested program time for Mr. Phillips. It appears from your response that at the same time (October 28) the agency also cancelled its sponsorship for the participating sponsor and submitted a service order for Mr. Phillips, which resulted in his appearance from

7:25 to 7:55 p.m. You also state that this appearance was "scheduled" "in fulfillment of what the station felt to be its obligation under the equal time provision of the Communications Act and the Commission's Rules and Regulations" because of Mr. Forbes' scheduled appearances. With respect to the allegation that you endorsed a slate of candidates you state that your Vice-President, who is also General Manager of the station, broadcast personal endorsements on election day of Mr. Phillips and other candidates during his morning news and commentary programs which read in part:

> It is my considered opinion that Mayor Park Phillips should be returned to office and so should all of the present City Council be returned to office. In addition, I endorse Rudy Moore, Jr. and Hugh Kincaid. Anyone that has different views of this opinion may have equal time by notifying KBRS Radio.

You assert that Mr. Forbes was in your studio at the time of the endorsement and could have responded to them on that day.

Mr. Forbes has replied to your response to his complaint by noting that although you stated that one of the regular sponsors during the 7:00–8:00 time period had cancelled its advertising for November 2, you did not indicate whether the other three regular sponsors during this period also cancelled their sponsorship, and in fact they did not. He also states that the station "seems to labor under the misapprehensions that because I had political time on November 2, 1970, that Mr. Phillips was also entitled to time on the same evening." He adds that, in actuality, Mr. Phillips' advertising agency was afforded fifty-five minutes of time, as compared to the thirty minutes purchased by Mr. Forbes. Regarding the endorsements, Mr. Forbes states that they were made without sufficient notification of himself and without any notification of the other candidates not endorsed.

You have replied to a further Commission inquiry of May 10, 1971, relating to the endorsement by stating that "the presentation of such broadcast matter on the day of the election is contrary to the policy of the Donrey stations" and that the Vice-President and General Manager of KBRS "has been reprimanded and warned not to permit a reoccurrence of such deviations from Donrey policy." The Commission made a further inquiry on October 8, 1971 in regard to the three other regular advertisers. You have submitted copies of agreements with these sponsors indicating that each was aware that the scheduled program could be pre-empted for a political program and that spot announcements for each sponsor could be delayed, which was done on the evening in question. You have also stated that announcements for advertisers, not regular sponsors which were scheduled for 7:00–8:00 p.m. were broadcast immediately before or after the political program featuring Mr. Phillips.

Mr. Forbes has replied stating that the November 1, 1971 response by the licensee did not disprove or refute his allegations. He states that the first 25 minutes of the hour in question seemed "rather loosely connected, unplanned, as if an expected program suddenly at the last moment disappeared . . ." and that he got the impression that "radio time was purchased just to keep it from being sold"; that he feels that no "equal time" obligation existed since he had not at that point used the time he had purchased; and that the procedure followed by the station to produce the necessary time and its failure to notify the spon-

sors of the pre-emption cast doubt on the station's position in the matter. He also points out that the one sponsor who allegedly cancelled to make time on the Monday night show renewed its sponsorship the following week.

Section 315 of the Communications Act requires that "[i]f any licensee shall permit any person who is a legally qualified candidate for public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting stations." The Commission has construed Section 315 as requiring that requests by candidates for equal opportunities be received within seven days of an opponent's appearance on a non-exempt program, whether it be during free or paid time, provided that both candidates are treated without discrimination in terms of, among other things, cost and time period. (See Section 73.120(c) and (3) of the Commission's rules.) Since Mr. Forbes has not rebutted your contention that a request was made by his opponent within or before the required time period, and since he has not demonstrated that the 7:25–7:55 time period was more desirable than the 6:30–7:00 p.m. time period (c.f. *E. A. Stephens*, 11 FCC 61 (1945)), no violation of Section 315 is involved in this respect. Regarding the assertion of Mr. Forbes that the advertising agency was afforded 55 minutes of time, it appears from your response that this was the initial understanding of the agency, but that Mr. Phillips did not appear on your station on November 2 for a longer period of time than Mr. Forbes.

However, it does appear that your conduct was such as to discriminate against Mr. Forbes. Once having told him that no political time was available after 7:00 p.m., you nevertheless decided to make time available to Mr. Phillips after 7:00 p.m. without notifying Mr. Forbes of this change. Regardless of whether or not you were obligated to make time available to Mr. Phillips as the result of Mr. Forbes appearance, some further action by you would appear to have been necessary in light of your previous representations to Mr. Forbes that the 7:00 p.m. to midnight period "was fully sold."

With regard to the endorsements on the day of the election, the Commission has stated that:

> When the President and controlling stockholder of a licensee . . . endorses candidates for public office, such endorsements are indistinguishable from a station editorial within the meaning of Section 73.123. *Colby Broadcasting Corp.*, 32 FCC 2d 285 (1971).

Although the endorsements here were made by the Vice-President and General Manager of KBRS, and not the President or controlling stockholder, the endorsements were, as in *Colby Broadcasting*, similarly indistinguishable from a licensee editorial requiring compliance with Section 73.123, even though they were not specifically labeled as a station editorial.

The Commission further stated in *Colby*:

> . . . [E]ven without the requirements of Section 73.123(c), the fairness doctrine would require that a reasonable opportunity should have been afforded to spokesmen for candidates running against those endorsed by Mr. Colby, before or after Mr. Colby's endorsements and before the election. (Cf., *WCMP*, 28 FCC 2d 391 (1971).) Moreover, repeated statements on the day before an election in support of a number of candidates for public office, without presenta-

tion of opposing views or notification of opposing candidates, is inconsistent with the spirit of Section 315 of the Communications Act and the Commission's policies set forth in *Nicholas Zapple*, 23 FCC 2d 707 (1970).

It is believed that the foregoing language is particularly applicable to the endorsements which you broadcast, and you failed to comply with the fairness doctrine, the spirit of Section 315 and Commission policies thereunder.

Your conduct in this case fell below the standards which the Commission expects of its licensees. This letter will be associated with the station's files where it will be available for future consideration.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division,
For Chief, Broadcast Bureau.

109-024--73——11

F.C.C. 72-842

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of an Application of SOUTH DAKOTA CLEARVIEW CABLE CO., INC., SIOUX FALLS, S. DAK. For Certificate of Compliance Pursuant to Part 76, Subpart B, of the Commission's Rules	CAC-82 (SD018)

MEMORANDUM OPINION AND ORDER

(Adopted September 20, 1972; Released September 26, 1972)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. South Dakota Clearview Cable Company, Inc., has applied for a certificate of compliance to begin cable television service in Sioux Falls, South Dakota, a major television market (Sioux Falls-Mitchell, South Dakota, #85). Apart from objections filed by professional sports interests, this application has been opposed by Sioux Falls Cable Television, a prospective competitor of the applicant in this market. We ruled recently that sports objections would be considered in connection with our deliberations in *Docket 19417* and not in the certificating process; see FCC 72-646.

2. The applicant intends to commence service with the following signals:

KELO-TV (CBS, Channel 11), Sioux Falls, South Dakota
KSOO-TV (NBC, Channel 13), Sioux Falls, South Dakota
KUSD-TV (Educ., Channel 2), Vermillion, South Dakota
KESD-TV (Educ., Channel 8), Brookings, South Dakota
KORN-TV (ABC, Channel 5), Mitchell, South Dakota
KCAU-TV (ABC, Channel 9), Sioux City, Iowa
KTIV (NBC, Channel 4), Sioux City, Iowa
WTCN-TV (Ind., Channel 11), Minneapolis, Minnesota
KWGN-TV (Ind., Channel 2), Denver, Colorado

The carriage of these signals and its proposal regarding access channels are consistent with the provisions of our Rules.

3. Sioux Falls Cable Television objects to certification on the grounds that the franchise awarded South Dakota Clearview did not comply with the franchise standards of § 76.31 of the rules in the following particulars: that (1) its qualifications were not scrutinized by the franchising authority "as part of a full public proceeding affording due process"; (2) the ordinance does not require significant construction to be accomplished within one year of receiving certification; (3) the initial franchise period (20 years) exceeds a reasonable duration; (4) changes in rates could be authorized without convening a public proceeding affording due process; (5) there is no provision in

the franchise for the investigation and resolution of subscriber complaints; and (6) there is no showing that the prescribed franchise fee of 5% of annual gross receipts or $5,000.00, was reasonably in excess of the 3% standard enunciated in our franchise guidelines. South Dakota Clearview returned to the franchising authority, and its franchise was amended in response to these objections. As a consequence, the applicant is now required to complete one-half its scheduled construction within one year of receiving the Commission's certification; the duration of the franchise has been reduced to fifteen years, renewal for five years; subscriber rates can only be changed following a "full public proceeding with notice to the public of the proposed rate increase"; subscriber complaints must be investigated and a business office maintained during normal working hours; the annual franchise fee has been reduced to 3%.

4. The franchise, as amended, now complies with the standards of § 76.31 of the Rules. However, there remains one issue to be resolved: was the franchise, as initially awarded and subsequently amended "approved by the franchising authority as part of a full public proceeding affording due process", as required by § 76.31(a)(1). The applicant has submitted affidavits of a stockholder in South Dakota Clearview and the City Auditor of Sioux Falls, South Dakota, which attest to a procedure of a first public reading of the ordinance awarding the franchise, followed by a second reading one week later, legal publication in a local newspaper, with the ordinance becoming effective on March 9, 1972, as no referendum to set aside this ordinance was filed.[1] The City Auditor avers that this same procedure was followed in the course of amending the franchise. The proposed amendments to the franchise were first publicly read on May 22, 1972, a second "public reading" occurred May 30, 1972, followed by legal publication on June 1, 1972. No referendum was filed to set aside the amended franchise, which then became effective June 22, 1972.

5. In the *Cable Television Report and Order*, 72–108, 37 Fed. Reg. 3252 (1972), we described the proceedings we expected to attend the award of a franchise:

> We expect that the franchising authority will publicly invite applications, that all applications will be placed on public file, that notice of such filings will be given, that where appropriate a public hearing will be held to afford all interested persons an opportunity to testify on the qualifications of the applicants, and that the franchising authority will issue a public report setting forth the basis of its action. (Paragraph 178)

It appears that many of the foregoing components of the public proceeding we had contemplated were elements of the process by which a franchise was first awarded South Dakota Clearview Cable Company,

[1] In his affidavit, David V. Vrooman, a director and stockholder in South Dakota Clearview described the procedure thusly:

"On February 7, 1972, a full hearing was had and the first reading of the ordinance was made at the official Commission meeting attended by both radio, press, and the general public, at which time a presentation was made by David V. Vrooman again reiterating the financial background, backing, technical know-how, management, etc., for this corporation, and all questions were answered to the satisfaction of the Commission and general public. The second reading of the ordinance was held on February 14, 1972, at which time members of the School Board, representatives of the Catholic schools and two private colleges appeared and asked questions regarding the educational channels which would be provided and other technical questions. Questions were asked by other people in the community as to the effect of cable television, but no further questions were asked at this time regarding the financial or technical ability of South Dakota Clearview Cable Company, Inc."

and subsequently amended. This conclusion is all the more compelling when we take note of the fact tnat South Dakota Clearview served a copy of its amended application containing these averments upon counsel for Sioux Falls Cable Television, who interposed no further objection.

In view of the foregoing, we are satisfied that the franchise was awarded pursuant to a "full public proceeding affording due process", and a certificate of compliance will be issued to South Dakota Clearview Cable, valid until March 9, 1987.

Accordingly, IT IS ORDERED, That the captioned application for certificate of compliance filed by South Dakota Clearview Cable, Inc., IS GRANTED.

IT IS FURTHER ORDERED, That the "Petition to Deny", filed by Sioux Falls Cable Television, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-889

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
HON. HARLEY O. STAGGERS, HOUSE OF REPRESENTATIVES
For Interpretation of Commission Memorandum

OCTOBER 5, 1972.

Hon. HARLEY O. STAGGERS,
Chairman, Special Subcommittee on Investigations,
Committee on Interstate and Foreign Commerce,
House of Representatives,
Washington, D.C. 20515

DEAR MR. CHAIRMAN: Your letter of July 24, 1972, requests the Commission to determine whether the May 16 legal memorandum of the General Counsel concerning the telephone extension monitoring activity conducted at the Commission in 1970 "reflects the considered judgment of the Commission." Your letter accepts the assurance given by me that there will be no repetition of such activity during my chairmanship, but raises the issue whether acceptance of the interpretation of the law in the memorandum might not lead to such activity by the private sector, other regulatory agencies, or even ". . . a future FCC which might not feel itself bound by the personal assurances you have given."

First, the Commission wishes to make clear that the pledge of no repetition does not rest only upon my personal assurance. The Commission has issued instructions to the same effect, and we assure you that those instructions, embodied in an official minute entry, will stand.

As to your request for our views on the legal position set forth in the memorandum, the Commission is not the expert legal entity on this matter. The Courts, of course, are the final arbiter, and so far as interpretation by a non-judicial source, the Department of Justice speaks for the Government on these matters, and we would therefore defer to its views on the legal issues here involved. When all this is taken into account, along with the views expressed by your Subcommittee, we believe that there is no likelihood that the Commission's 1970 activity will be taken or regarded as a precedent.

However, we do not see any reason to equivocate over this point. Both you and the Commission firmly believe that the 1970 activity should not occur in the future. It follows that neither of us wants the memorandum in question to be taken as a precedent for similar activities in the future. Therefore, without regard to the legality of the position taken in the memorandum—a matter we leave to the Courts and in any event as to which we defer to the Department of Justice—

we are glad to have the record reflect the full Commission's position that the memorandum, as amplified by the General Counsel's testimony, should not be regarded as precedent for Government agencies, private employers or other private parties to engage in monitoring activities of the sort involved in the 1970 incident.

We hope that the foregoing is helpful to the Subcommittee in its effort to conclude this matter.

By Direction of the Commission,
Dean Burch, *Chairman.*

F.C.C. 72-1189

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
STARK COUNTY COMMUNICATIONS, INC., BEACH CITY, OHIO	CAC-996 OH 256
STARK COUNTY COMMUNICATIONS, INC., WILMOT, OHIO	CAC-997 OH 257
STARK COUNTY COMMUNICATIONS, INC., JUSTUS, OHIO	CAC-998 OH 258
STARK COUNTY COMMUNICATIONS, INC., HARMON, OHIO	CAC-999 OH 259
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted December 20, 1972; Released January 3, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING.

1. On August 9, 1972, Stark County Communications, Inc., filed the above-captioned applications for certificates of compliance for new cable television systems to operate from a common head end at Beach City, Wilmot, Justus and Harmon, Ohio, communities located in the Cleveland-Lorain-Akron television market (the eighth largest). Stark County proposes to carry the following signals on its systems:

WKYC-TV (NBC), Cleveland, Ohio
WEWS (ABC), Cleveland, Ohio
WJW-TV (CBS), Cleveland, Ohio
WKBF-TV (Ind.), Cleveland, Ohio
WVIZ-TV (Educ.), Cleveland, Ohio
WUAB-TV (Ind.), Lorain, Ohio
WAKR-TV (ABC), Akron, Ohio
WJAN (Ind.), Canton, Ohio

These applications are unopposed.

2. Section 76.251 of the Commission's Rules requires that new cable television systems in major television markets have a minimum capacity of twenty channels; a plant with two-way communications capability; and separate channels for public, educational and local government access. Stark County requests a partial waiver of Section 76.251 of the Rules so that it need not provide separate access channels in each community. As support for this request, Stark County points to the small number of potential subscribers: Beach City's 1970 population was 1,133; Wilmot—378; Justus—an unincorporated community of 77 homes; and Harmon—an unincorporated community of 44 homes. Stark County expects to obtain perhaps 500 customers, and argues that absolute compliance would impose an impossible burden on the system, requiring financial resources it will not have. Moreover, Stark County

suggests that in view of the very small size of the communities involved there will not be demand for three separate access channels in each community.

3. We acknowledged in the *Cable Television Report and Order* that our access requirement could impose an "undue burden" on isolated systems located in the major television markets, and we expected to provide relief from these requirements in appropriate situations.[1] We are satisfied that the very small size of the communities here involved justifies the requested partial waiver to allow Stark County to provide one set of three access channels rather than a separate set for each community which could otherwise be required. However, should sufficient demand for these channels develop, we expect Stark County to make additional access channels available.[2]

In view of the foregoing, the Commission finds that partial waiver of Section 76.251 of the Rules and grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That Stark County Communications, Inc., IS GRANTED a partial waiver of Section 76.251 of the Rules to the extent indicated in paragraph 3 above.

IT IS FURTHER ORDERED That, the applications (CAC–996, 997, 998, 999) for certificates of compliance filed by Stark County Communications, Inc., for Beach City, Wilmot, Justus and Harmon, Ohio, ARE GRANTED and appropriate Certificates of Compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[1] Paragraph 148, *Cable Television Report and Order*, 36 FCC 2d 143, 197 (1972).
[2] *See Gerity Broadcasting*, FCC 72–651, — FCC 2d —.

F.C.C. 73-72

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
STERLING MANHATTAN CABLE TELEVISION, INC., COMPLAINANT
v.
NEW YORK TELEPHONE CO., DEFENDANT

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 24, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON, REID, AND WILEY CONCURRING IN THE RESULT.

1. The Commission has before it for consideration a formal complaint and petition for cease and desist order filed pursuant to Section 208 of the Communications Act by Sterling Manhattan Cable Television, Inc. (Sterling) on July 10, 1972, an answer timely filed by New York Telephone Company (Telephone Company) on July 25, 1972, and a reply timely filed by Sterling on August 7, 1972.[1]

2. Sterling, a wholly owned subsidiary of Sterling Communications, Inc., is a New York corporation and the operator of a cable television (CATV) system in the southern portion of the Borough of Manhattan in New York City, New York. The service it provides consists of the transmission of standard television broadcast signals which it does not originate, the transmission of non-broadcast signals which it does originate, and the provision of access channels. With our encouragement, Sterling has been a leading innovator in program origination and the development of free citizen access channels. It operates pursuant to a

[1] Also before us are a joint request to be made parties to the proceeding filed by TelePrompTer Corporation and TelePrompTer Manhattan CATV Corporation (hereinafter jointly referred to as TelePrompTer) on July 25, 1972, an opposition thereto timely filed by Telephone Company on August 1, 1972, a statement in support of Sterling filed by TelePrompTer on August 8, 1972, a request to be made a party and statement in support of Sterling filed by the National Cable Television Association (NCTA) on August 7, 1972, a request for leave to intervene if Sterling's complaint is not dismissed filed by the Public Service Commission of the State of New York on August 14, 1972, a motion for leave to intervene and an opposition to Sterling's complaint filed by the National Association of Theatre Owners, Inc. (NATO) on August 15, 1972, a motion for leave to intervene and comments filed by Columbia Pictures Industries, Inc. (Columbia) on August 25, 1972 and errata filed August 28, 1972, a request to be made a party and comments filed by Motion Picture Association of America, Inc. on August 29, 1972, a response filed by Telephone Company on September 5, 1972, an opposition to NATO's motion filed by Sterling on August 30, 1972, a petition to be made a party and for leave to file a statement within 30 days filed by the City of New York on September 5, 1972, and an opposition thereto timely filed by Columbia on September 6, 1972, a petition for consolidation filed by American Broadcasting Companies, Inc. (ABC) on September 6, 1972, and pleadings responsive thereto, and an opposition to intervention of MPAA and response to Columbia filed by Sterling on September 7, 1972, a letter to Chairman Burch filed by the United States Independent Telephone Association (USITA) on September 11, 1972, a reply to Sterling's opposition to its motion for leave to intervene timely filed by NATO on September 12, 1972, Statement in support of Sterling filed by The City of New York on October 2, 1972, comments of The National Association of Regulatory Utility Commissioners (NARUC) filed November 2, 1972, and opposition to NARUC's comments filed by Sterling on November 8, 1972.

franchise granted by the City of New York, and, as a CATV operator, is also subject to Part 76 of our rules.

3. Telephone Company is a wholly owned subsidiary of American Telephone and Telegraph Company and a carrier subject to our jurisdiction with respect to interstate communication services, and to the jurisdiction of the New York Public Service Commission with respect to intrastate communication services. Pursuant to tariff schedules filed with the Public Service Commission, it furnishes non-broadcast or closed-circuit video and associated audio tranmission services, among others.

4. On June 28, 1972, Trans-World Communications (Trans-World), a division of Columbia Pictures Industries, Inc. (Columbia), commenced showing movies in the rooms of five hotels in New York City. In doing so, it subscribes to a Telephone Company closed-circuit transmission service utilizing Telephone Company video and associated audio channels. The service provided by Telephone Company is between Trans-World's signal source in the Columbia Pictures Building at 711 5th Avenue in New York City and the hotels involved. Sterling contends that Telephone Company's operation of such facilities without having obtained our certification under Section 214(a) of the Communications Act is unlawful.[2] We are asked to institute a show cause proceeding looking toward the issuance of a cease and desist order which would enjoin Telephone Company from operating said facilities and enjoin it from constructing additional such facilities without first obtaining Section 214 certificates of public convenience and necessity.

5. Trans-World's closed-circuit operations compete with Sterling's CATV operations. Sterling presently provides CATV services to the Plaza Hotel, one of the hotels served by Trans-World. The Trans-World service utilizes the distribution facilities of the hotels' master antenna television systems (MATV's) to deliver motion picture programming to television sets in the hotels' rooms. The television sets are also capable of receiving standard television broadcast signals via the hotels' MATV's. A hotel guest wishing to view a particular movie must pay a separate fee which is added to his hotel bill.

6. Sterling alleges that Trans-World's closed-circuit video transmission system has the capacity to carry live television broadcasts and of being interconnected by wire, microwave, or satellite with other similar closed-circuit systems or with CATV systems. Trans-World has agreed to provide comparable program services in other hotels in New York City and other major cities. Service may be available to as many as seventeen New York hotels by February of 1973 and to approximately 29,000 rooms in six cities by the end of 1972. Trans-World has committed over $20,000,000 to the development of its service which will allow it to install closed-circuit service in approximately 160,000 hotel rooms, or about one-sixth of the nation's hotel rooms.

[2] Section 214(a) provides, in pertinent part, as follows: "No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operaton of (1) a line within a single State unless such line constitutes part of an interstate line . . ."

7. All of the facilities which Telephone Company uses to provide the subject services to Trans-World are situated wholly within the State of New York. Sterling contends that such facilities, nevertheless, constitute an interstate line requiring our certification under Section 214 of the Act. In support of such contention, Sterling argues that the transmissions involved are of an interstate character because the movies transmitted have "originated" outside of the state and are devised for and distributed to national audiences. Sterling notes that the Supreme Court, in finding that CATV systems are engaged in interstate communication, took notice that "television broadcasting consists in very large part of programming devised for, and distributed to, national audiences . . ." (footnote omitted).[3] Sterling also relies upon language in the recent *Midwest Video* case [4] that the capacity for interstate nonbroadcast programming may in itself suffice to bring CATV cablecast transmissions within the compass of Section 2(a) of the Communications Act.[5]

8. Finally, Sterling argues that the Telephone Company activity in question is interstate in nature because it will impact on interstate communications which we regulate such as cable television systems and television broadcast stations. Such regulated entities are subject to restrictions on the type of programming which they may offer on a subscription television or pay cable basis. Sterling contends that Telephone Company's activity is unregulated and will result in serious adverse impact on CATV systems and television broadcast stations in New York City.

9. Sterling's position is supported by NCTA (the cable industry's national trade association), and by TelePrompTer Corporation and its subsidiary, TelePrompTer Manhattan CATV Corporation. The latter, like Sterling, has CATV operations in Manhattan which are franchised by the City of New York. The Telephone Company, the Public Service Commission of the State of New York, The National Association of Theatre Owners, Inc., Columbia, NARUC, USITA and Motion Picture Association of America, Inc. oppose the relief sought by Sterling.

10. Telephone Company states that the closed-circuit video and associated audio services in question are intrastate communication services furnished pursuant to tariff schedules filed with the State of New York.[6] Telephone Company has informed Trans-World that, under the State tariff, such services are available only within the State of New York and cannot be used to retransmit program material picked up off-the-air. It contends that the services furnished are not interstate services and that the facilities and operations involved do not require certification under Section 214 of the Act. It asks that

[3] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, at pp. 168–69. The Court there held that CATV systems are engaged in interstate communication because of their carriage of television broadcast signals.

[4] *United States* v. *Midwest Video Corp.*, — U.S. —, 32 L. Ed. 2d 39, 92 S. Ct. 1860, 40 U.S.L.W. 4626 (June 7, 1972). The Supreme Court noted that it had declined in the *Southwestern* case to carve CATV broadcast transmissions into their interstate and intrastate components for the purpose of determining the extent of our regulatory authority.

[5] Section 2(a) provides, in pertinent part, that the provisions of the Act shall apply to all interstate communication by wire or radio which originates and/or is received within the United States.

[6] PSC No. 806-Telephone, on file with the New York Public Service Commission since June of 1963.

Sterling's petition for a cease and desist order be denied and that Telephone Company be reimbursed for all reasonable costs resulting from this proceeding.

11. The Public Service Commission of the State of New York (PSC) opposes the relief requested by Sterling. It notes that the service provided by Telephone Company for Trans-World is rendered in accordance with the terms of a tariff on file with PSC and by means of facilities which, in its view, do not require certification pursuant to Section 214(a) of the Act. Accordingly, PSC believes that we should dismiss Sterling's complaint and petition. It wishes to be notified and given an opportunity to intervene if we decide to institute further proceedings in this matter. USITA and NARUC have taken a similar position.

12. The relief which Sterling seeks is also opposed by the National Association of Theatre Owners, Inc. (NATO). NATO is a nationwide organization comprised of state and regional organizations of motion picture theatre owners. It opposes the action requested by Sterling as premature. NATO alleges, in effect, that the siphoning of current movies by cable pay TV will lead to the destruction of the motion picture theatre industry, a vital force in the commercial and cultural life of America's decaying cities, thus hastening the destruction of those cities. NATO contends that cable pay TV exhibition of current movies will also siphon programs from "free" or broadcast television, adversely affecting the quality and diversity of programming available off-the-air. Further, because cable pay TV operators have given no assurance they will or can insure that children and teenagers are not exposed to "unsuitable" movie content, serious and complex questions of public morality are involved according to NATO. Finally, NATO argues that we should take no *ad hoc* action based upon the assumption that cable pay TV is a proper subject for our regulation before issues involved in Docket No. 19554 [7] and in *National Association of Theatre Owners, Inc.* v. *Federal Communications Commission* (CADC Case No. 721660) are finally resolved.

13. Columbia Pictures Industries, Inc. (Columbia) is engaged primarily in the production and distribution of motion pictures. Its Trans-World division furnishes motion pictures via closed-circuit facilities to hotel guests for a fee, using, in part, Telephone Company closed-circuit channel lines and services to participating hotels in New York City.[8] A travelogue and preview film are also furnished by Trans-World at no charge to the hotel guests. Trans-World has stated that it has no intention of supplying any other programming without our prior express authorization. It further states that it has not transmitted and has no intention of transmitting, the programming of any broadcast station or CATV system. Columbia argues that the lines provided

[7] *In the Matter of Amendment of Part 76, Subpart G, of the Commission's Rules and Regulations Pertaining to the Cablecasting of Programs for which a Per-program or Per-channel Charge is Made,* 35 FCC 2d 893 (FCC 72–652, released July 24, 1972).

[8] Telephone lines are not the only means by which Trans-World intends to provide program services to hotels throughout the nation. It has filed applications for private microwave facilities for Atlanta, Boston, New Orleans, Dallas, and Las Vegas. It had requested that the Atlanta application (FCC File No. 18006–IB–22X) be held in abeyance pending the consummation of a contract for the leasing of channels from a CATV system. Trans-World states that it intends to remain flexible with respect to the means of its presenting feature films in hotels for a fee and that it will decide on a city-by-city basis which of the available means will be most efficient, practical, and economical.

by Telephone Company for closed-circuit transmission service to Trans-World are intrastate lines and, accordingly, Section 214 of the Act, which is concerned with interstate lines, is inapplicable thereto. It therefore requests that Sterling's petition for a cease and desist order, which is based solely upon an alleged violation of Section 214, be denied.

14. Columbia alleges that the Sterling complaint and its attendant publicity will have a substantial and adverse impact upon Trans-World's plans and commitments unless resolved expeditiously. We are urged by Columbia to expedite action on the complaint in order to prevent further injury to Trans-World and to avoid allowing our processes to be used to foster anti-competitive practices. Columbia notes, in this connection, that Time, Inc. is in direct competition with Trans-World in New York City—not only through Sterling's CATV operations[9]—but also through Computer Cinema,[10] an exhibitor of current motion pictures on television sets in hotel rooms including a Holiday Inn in New York City which was scheduled to begin operating in July of this year.[11] Columbia alleges that any delay in resolving Sterling's complaint will severely hamper Trans-World's operations in New York City[12] and other major cities, that contracts with hotel operators throughout the country require installation of Trans-world's system by specific dates, that failure to meet such dates will cause it to lose its rights with respect to those hotels, and that such delay was the apparent motivation for the instant complaint having been filed. Columbia states that it intends to supply feature films to all media, including other hotel services, CATV and video cassettes. It argues that the public interest, and those of the motion picture and communication industries, will be promoted by increasing the diversity of exhibition media and the variety of motion picture products, and that such goals will be advanced by a prompt determination of the narrow issued raised by the instant complaint.

15. In addition to questioning the purpose of the Sterling complaint, Columbia also regards the complaint, and related pleadings in support thereof, as a request for rulemaking looking toward our regulation of closed-circuit television. For example, it notes a suggestion by NCTA that the problem of disparity in the requirement of Commission approval for various systems of distribution might be solved by redefining a CATV system to include MATV's. Columbia contends that questions with such rulemaking or broad policy aspects which are posed in the complaint and related pleadings here before us should have been filed in a request for rulemaking and be handled separately

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[9] See paragraph 5, above. Time-Life Cable Communications, Inc., a wholly owned subsidiary of Time, Inc., owns over 46% of Sterling Communications, Inc., Sterling's parent corporation.

[10] Computer Cinema is a division of Computer Television, Inc. and affiliated with Time, Inc.

[11] It appears that the Computer Cinema system has used a single video cassette player or videotape cartridge machine inside the hotel, rather than originating its programming from an outside point as does Trans-World, thus obviating the need for leased telephone lines. However, it further appears that Computer Cinema will feed programming from a central location over leased telephone lines when its system goes into three Chicago hotels rather than utilize the video cassette method of origination. According to Columbia, the latter method results in a more expensive and less desirable service to the public.

[12] It appears that Sterling is actively exploring the possibilities of subscription programming. See "An Overview of Pay Cable Television" by Theodore S. Ledbetter, Jr. and Susan C. Greene, *Yale Review of Law and Social Action*, Vol. 2, No. 3, 1972, p. 213, and *Interpretive Ruling*, 31 FCC 2d 747 (1971) in response to request of Sterling.

from relatively narrow legal issues which may properly be raised in a complaint filed pursuant to Section 208 of the Act.[13]

16. Motion Picture Association of America, Inc. (MPAA), a trade association composed of producers and/or distributors of motion pictures, also opposes the Sterling complaint and urges expeditious disposition of this proceeding. MPAA contends that hotel room programming service systems serve as a vitally needed supplemental outlet for motion picture producers and distributors and offer them an opportunity to gain an audience among those 30 years of age or over who, as a group, do not regularly patronize motion picture theatres according to a 1971 study which it had conducted. MPAA states that the number of films placed into production and the amount budgeted for each are predicated upon estimates of audience potential; that increases in both the amount and variety of film production will be stimulated to the extent that hotel room programming service systems increase the audience potential for motion pictures; and that an increase in the number of films available for exhibition and the available means by which they may be viewed will result in the abundance and diversity which we have sought to encourage. Noting that the Department of Justice has stated that competition both within and between modes of communications should be encouraged rather than hindered, particularly in the broadcast area, MPAA argues that Sterling is attempting to invoke our jurisdiction to obtain a monopoly over hotel room programming service in the mid-Manhattan area.

17. Telephone Company opposes TelePrompTer's request to intervene as premature at this time. It contends that TelePrompTer is not now an interested party and that its intervention would not serve any useful purpose. The requests for intervention filed by NCTA and NATO are similarly opposed by Telephone Company. On the other hand, it supports Columbia's request to intervene should Sterling's complaint not be promptly dismissed as Telephone Company contends it should be. The intervention sought by NATO to oppose Sterling's complaint is opposed by Sterling. Sterling regards such opposition as "curious" because it believes NATO would be adversely affected by denial of the relief sought by the complaint. Sterling also opposes our consideration of the comments filed by NARUC. Although our procedures for handling Section 208 complaints do not ordinarily contemplate pleadings other than the complaint itself, an answer thereto by the carrier, and an optional reply by the complainant, we believe that TelePrompTer, NCTA, PSC, NATO, MPAA, Columbia and the City of New York should be granted limited intervention to participate in this matter. The pleadings which they filed in support of, or in opposition to, Sterling's complaint and petition may be regarded as analogous to *amici curiae* briefs, and have been considered along with the comments of USITA, NARUC and the Illinois Commerce Commission, in reaching our conclusions herein. On the other hand, in light of the action taken herein, New York City's suggestion that it has a right to submit additional comments in this proceeding will be denied.

[13] Section 208 provides, in pertinent part, that any person complaining of anything done or omitted to be done by any common carrier subject to the Act, in contravention of the Act's provisions, may petition the Commission with a brief statement of the facts.

18. Telephone company charges for use of private line facilities located wholly within a state when such usage is limited to closed-circuit transmissions originating and terminating in such state have historically been filed in state tariffs and not in F.C.C. tariffs, with the Commission's acquiescense.[14] The private line common carrier communication services here involved are provided by Telephone Company to Trans-World wholly within the City of New York. Regulatory jurisdiction over those services and the facilities used to supply them has been asserted by the State of New York, through its Public Service Commission. The cases principally relied upon by Sterling in support of its position that we should preempt jurisdiction over such services and facilities all concern distribution of broadcast signals (or cable television systems which, by definition, are engaged in distributing broadcast signals), and thus involve interstate communication by wire and radio. Such cases are clearly distinguishable from that here before us which is concerned with the wire transmission of non-broadcast, closed-circuit television and audio signals within the City of New York. We have previously held that carrier facilities, even when wholly situated within a state's borders, which transmit television broadcast signals constitute part of an interstate line, and thus are subject to Section 214 certification.[15] However, no similar finding can be made here because the Telephone Company facilities are not utilized to carry broadcast signals. Sterling correctly recognizes that our jurisdiction to regulate carriage of broadcast signals by a common carrier which had not transmitted across state lines was based on the recognition that broadcast signals do not stop at state lines and, thus, are inherently interstate in nature. In this connection, Sterling cited *Federal Radio Com'n* v. *Nelson Bros. Bond and Mortgage Co.*, 289 U.S. 266, 279, among other cases. Sterling then argued that the Supreme Court did not rely on this approach in the *Southwestern* case.[16] In support of its contention, Sterling quoted a passage of the Court's opinion. However, since the Court there cited the very same *Nelson Bros.* case as authority for the quoted passage, we cannot agree with Sterling that its position is supported by *Southwestern*.

19. Even though the carrier's transmission facilities with which we are here concerned are wholly intrastate, it is argued that the entire process by which movie films are transported and distributed throughout the nation involves the crossing of state lines in an unbroken stream of commerce, and that Telephone Company must therefore be engaged in interstate communication. We find no logical rationale for such conclusion. Even if Trans-World is engaged in interstate transportation (i.e., nationwide distribution of movie films) and is therefore engaged in interstate commerce, it does not necessarily follow that the limited portion of the entire process which Telephone Company performs (i.e., the wire communication within New York City) is

[14] Section 2(b) of the Act provides in pertinent part, that, subject to the provisions of Section 301 of the Act dealing with licensing of radio, nothing in the Act shall be construed to apply or to give the Commission jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.

[15] *General Telephone Company of California, et al.*, 13 F.C.C. 2d 448; affirmed *General Telephone Company of California, et al.* v. *Federal Communications Commission*, 413 F. 2d 390 (C.A.D.C.); *cert. den.*, 396 U.S. 888 (1969). See also *Section 214 Applicability to Broadcast Channel Service*, 22 F.C.C. 2d 526 (1970).

[16] *United States* v. *Southwestern Cable*, 392 U.S. 157 (1968).

therefore interstate communication within the meaning of the Act.[17] Merely because a form of commerce may be subject to federal legislation under "the commerce clause" of the United States Constitution,[18] it does not necessarily follow that Congress has acted with respect thereto. Furthermore, even if Congress has acted, it also cannot be automatically assumed that jurisdiction over the matter has been delegated to this Commission. Our jurisdiction and power can be no greater than that which Congress has conferred upon us.[19] It is clear that we do not have authority to regulate every form of interstate commerce and that every form of interstate commerce is not a channel of communication or "line" within the meaning of Section 214(a) of the Act. TelePrompTer, as well as Sterling and NCTA, would include the carrying of movie films from outside New York State to New York City by mail, private aircraft, or other means of transportation as part of the "wire communication" here involved in order to render it subject to our regulatory jurisdiction. However, the Supreme Court has rejected a similar contention as to when "wire communication" commenced when it said:

> Words written by a person and intended ultimately to be carried as so written to a telegraph office do not constitute a communication within the terms of the Act until they are handed to an agent of the telegraph company.[20]

We agree with Trans-World that the wire communication here involved starts with the transmission over Telephone Company facilities, and not with the transportation from outside New York State of movie films intended for exhibition in New York City.

20. We turn now to another basis advanced for our asserting Section 214 jurisdiction over the activity of Telephone Company here involved—the impact arguments. Sterling contends that such activity, if permitted to continue, can only result in serious adverse impact on cable television systems and television broadcast stations operating in New York City. The NCTA is concerned that unregulated pay-cable-casting systems could erode the economic base necessary for CATV systems to provide various consumer services. It argues that the integrity of the Commission's entire CATV regulatory scheme, as well as the "integrity" of the operator's franchised service area, is threatened where a video supplier (such as Trans-World) deals with a distribution system falling outside of the Commission's definition of a CATV system (such as a hotel's MATV system). Since MATV's are engaged in interstate communications (i.e., receiving and distributing broadcast signals) and since MATV's are a necessary component of Trans-

[17] Section 3(e) defines "interstate communication" or "interstate transmission" as: "communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of title II of this Act (other than Section 223 thereof) include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission." (footnotes omitted)

[18] The "commerce clause" provides, in pertinent part, that Congress shall have the power to regulate commerce with foreign nations and among the several states. (Constitution of the United States of America, Article I, Section 8).

[19] See our memorandum on our jurisdiction and authority over cable television, *CATV*, 2 F.C.C. 2d 793, 796 (1966) and cases therein cited.

[20] *Goldman* v. *United States*, 316 U.S. 129, 133 (1942).

World's pay-cablecasting system, NCTA claims that Trans-World's system is, therefore, also engaged in interstate communications.

21. We must in the final analysis resolve this issue based on the facts and considerations now before us. On that basis, we do not believe that a case has now been made out for asserting Section 214 jurisdiction, even if we assume, *arguendo*, that any wire communication service involving a TV receiver set can be regarded as interstate if it has substantial and close impact upon the interstate scheme involving transmissions to such receivers. Cf. *Midwest Video*, fn. 21, —— U.S. ——: *Fisher's Blend.* —— U.S. ——. In light of what we now know of the Trans-World operations, Sterling's fears would seem to be speculative and not supported by any specific factual allegations as to how the viewing public in or near the nation's number one television market would be adversely affected.[21] Trans-World's proposals are directed to the showing of motion pictures in hotels, and thus would not appear to have any impact on broadcasting in the area and only limited possible impact on cable. We recognize that this picture could change, or that taking into account the plans of many entities in this new field, there could be the impact in question, both on broadcasting and on cable. At this time, however, we find no basis on this ground for asserting jurisdiction.[22]

22. If Trans-World or some entrepreneurs should develop new plans that change drastically the nature of the issue we are exploring in the proceeding (e.g., service to residential apartments rather than hotels, which are predominantly transient, or transmission of program material other than feature films), we can be promptly notified of such plans, and we can act to maintain our authority to protect the public interest.

23. We turn now to the final basis of our claimed jurisdiction—the potential for interstate service. Columbia has stated that Trans-World does not intend to receive any interstate video signals by wire and retransmit such signals to hotels it now serves or may hereafter serve, nor to interconnect any of its systems once they commence operations. It further has stated that Trans-World's equipment does not now have the capability to interconnect with other non-broadcast video systems or with cable systems in other cities and that it does not intend that such capability exist in the future. However, even if it were assumed that the facilities involved were technologically capable of transmitting broadcast television signals or being interconnected with other facilities to provide interstate service in the future, that would not render the facilities necessarily subject to

[21] Reliance upon the *Shreveport Rate Case* (*Houston East and West Texas Railway Co. v. United States*, 234 U.S. 342 (1914)) by Sterling and NCTA, in this connection, is misplaced. That case involved obvious discrimination between freight rates for intrastate and interstate segments of service provided by the same rail carrier. As noted by Columbia, the Federal jurisdiction in such a case rests in discriminatory practices by the carrier which tend to favor one customer over its competitors. However, as Columbia correctly further notes, there is not even an allegation of such discrimination by Telephone Company in this case. Furthermore, it is clear from the legislative history of Section 2 of the Act that, in reserving control of intrastate common carrier communication traffic to the State commissions, Congress did not want this Commission to go as far in regulating the telephone industry as the Interstate Commerce Commission had with respect to the railroad industry through the Shreveport case and similar decisions prior to 1934. See remarks of Senator Dill, especially at 78 *Congressional Record* 8823 (May 15, 1934).

[22] It should be noted that we are today instituting a broad proceeding concerning the competitive relationships between the various methods of transmitting motion pictures to hotels and existing cable and broadcast services.

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Section 214 certification requirements at this time.[23] Reliance is placed by Sterling and NCTA upon language in the *Midwest Video* case to the effect that the capacity for interstate non-broadcast programming may, in itself, suffice to bring cablecasts within our jurisdiction as interstate communication. First, the Supreme Court found it unnecessary to decide the question since the fact of interstate communication was there assumed because of the transmission of broadcast signals. Second, in that case there was every promise and indeed encouragement by this Commission of the non-broadcast transmission being interstate in nature. This is not so in the instant case, so the matter is speculative in this context. While it has been argued that we should assert Section 214 jurisdiction over facilities technologically capable of transmitting broadcast television signals or being interconnected with other facilities to provide interstate service in the future, we do not believe this interpretation of Section 214 is either necessary or desirable on the limited factual circumstances of record in the case now before us.

24. One final matter remains to be considered. Telephone Company has requested reimbursement for all reasonable costs resulting from this proceeding. Presumably, it wishes us to order Sterling to reimburse it for such costs, although this was not expressly stated. Indeed, Telephone Company failed even to allege any reason why it seeks such relief or to cite any statutory basis upon which we could properly entertain its request and order such relief. As far as we are able to ascertain, grant of such extraordinary relief would be unprecedented even if our authority to do so were clearly established, which it is not. Under the circumstances, we are not disposed to entertain Telephone Company's request for reimbursement of its costs.

25. Accordingly, IT IS ORDERED, That the petition for a cease and desist order filed by Sterling Manhattan Cable Television, Inc. IS, HEREBY, DENIED without prejudice to whatever action the Commission may find appropriate as a result of the new proceeding we are instituting this date.

26. IT IS FURTHER ORDERED, That the requests for intervention and statements in support of, or in opposition to, the Sterling petition for a cease and desist order filed by TelePrompTer Corporation and TelePrompTer Manhattan CATV Corporation, the National Cable Television Association, the New York State Public Service Commission, the National Association of Theatre Owners, Inc., the Motion Picture Association of America, Inc., Columbia Pictures Industries, Inc., the City of New York, the National Association of Regulatory Utility Commissioners and the United States Independent Telephone Association ARE, HEREBY, GRANTED to the extent reflected herein, and otherwise ARE DENIED.

27. IT IS FURTHER ORDERED, That the petition for consolidation filed by American Broadcasting Companies, Inc., requesting consolidation of this proceeding with other proceedings, IS HEREBY DENIED without prejudice to whatever action may be taken by the

[23] Such certification, of course, would be required before Telephone Company could lawfully use the subject facilities to transmit broadcast television signals for cable system operators. See *General Telephone Company of California, supra.* We have provided blanket authorization for channels of ten miles or less used in connection with broadcast stations. *Section 214 Applicability to Broadcast Channel Service,* 22 F.C.C. 2d 526 (1970).

Commission with respect to the new proceeding established this date.

28. IT IS FURTHER ORDERED, That New York Telephone Company's request for reimbursement of reasonable costs resulting from this proceeding is HEREBY DENIED.

29. IT IS FURTHER ORDERED, That the Chief, License Branch Common Carrier Bureau shall mail a copy of this Memorandum Opinion and Order to counsel of record for Sterling Manhattan Cable Television, Inc., New York Telephone Company, TelePrompTer Corporation and TelePrompTer Manhattan CATV Corporation, the National Cable Television Association, the Public Service Commission of the State of New York, the National Association of Theatre Owners, Inc., the Motion Picture Association of America, Inc., Columbia Pictures Industries, Inc., the City of New York, American Broadcasting Companies, Inc., United States Independent Telephone Association, and the National Association of Regulatory Utility Commissioners.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-67

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF SUMMA CORP., LICENSEE OF TELEVISION STATION KLAS-TV, LAS VEGAS, NEV.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 22, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONER WILEY CONCURRING IN THE RESULT.

1. The Commission has under consideration (1) its Notice of Apparent Liability dated July 26, 1972, addressed to Hughes Tool Company,[1] licensee of Television Station KLAS-TV, Las Vegas, Nevada (2) an affidavit dated August 17, 1972, from the general manager of KLAS-TV filed in response to the Notice of Apparent Liability, and (3) a further response dated December 5, 1972, from the licensee to a letter of inquiry dated November 15, 1972, in which the Commission requested further information in connection with the licensee's response to the Notice. The licensee also made available to the Commission a letter dated August 23, 1972, from the general manager of KLAS-TV to its Washington counsel containing clarifying information with regard to the matters for which apparent liability was incurred.

2. The Notice of Apparent Liability in this proceeding was issued because of the licensee's apparent willful violations of Section 73.1205 of the Commission's Rules concerning fraudulent billing. According to information obtained during a field inquiry into the operation of KLAS-TV, the licensee apparently violated Section 73.1205 by sending invoices to Wells, Rich Green, Inc. pertaining to advertising for Midas Mufflers which warranted that the actual broadcast information shown thereon was taken from program logs, whereas in fact, in some instances, the times shown on the invoices differed from the actual times of broadcast as shown on the logs. One of the invoices was issued for June and July and the other for July and August 1971. The licensee apparently further violated Section 73.1205 by issuing to Charleston TV & Appliance invoices containing false information concerning the amount actually charged for advertising. The invoices had been forwarded by the dealer to Zenith and GTE Sylvania for reimbursement under cooperative advertising agreements. The details of the violations are set out in the Notice of Apparent Liability. The Notice indicated that the licensee was subject to apparent forfeiture liability in the

[1] Change of licensee name to Summa Corporation was granted by Broadcast Bureau action December 14, 1972 (BMLCT-748).

amount of four thousand dollars ($4,000) pursuant to Section 503 (b) (1) (B) of the Communications Act of 1934, as amended.

3. In response to the Notice of Apparent Liability, the licensee denies liability for invoices forwarded by Charleston TV & Appliance to Zenith and Sylvania. In affidavits filed with the Commission, the licensee states that the invoices in question were issued to Charleston TV & Appliance by parties unknown to it, and that it never issued fraudulent bills or invoices to Charleston. The licensee points out that some of the invoices passed on to Zenith and Sylvania by Charleston for cooperative payments were not typed on the invoice stationery of Hughes Tool Company, but on that of Las Vegas Television, Inc. the previous licensee. The licensee notes that the August invoice for Sylvania and the July invoice for Zenith were notarized with an expired notary stamp. The licensee also points out discrepancies in the print of the typewriter on which the invoices were produced and the format of the invoices as additional evidence that the documents were not issued under the direction and control of the licensee. One invoice (for August advertising of Zenith products) which was forwarded by Charleston to Zenith was in fact on invoice stationery of the present licensee and was notarized with a valid stamp. Licensee states, however, that it was on an outdated invoice form of the licensee which was unlike other invoices than being issued by licensee. Although the licensee makes no accusations, the implication of its response is that the dealer, its advertising agency or someone else cooperating with the dealer obtained blank invoice forms and executed them. The licensee asserts "that the Commission's notification of apparent liability was in part incorrect and based on improper assumptions by the Commission on wrongdoing by KLAS," and that it hopes that "in view of this rather extensive investigation, you are now able to resolve this matter by issuing an appropriate document setting forth a proper factual basis of liability on the part of KLAS–TV." However, the licensee has made no showing concerning the invoices issued to Wells, Rich Green, Inc. for Midas Muffler advertisements, except to make a bare denial of participating in "any double billing".

4. We have considered the licensee's response and find that the licensee violated Section 73.1205 of Rules as detailed in the Notice of Apparent Liability with respect to the invoices issued to Wells, Rich Green, Inc. Since the licensee made no showing concerning these invoices, we can conclude only that the parts of our Notice concerning these documents are uncontested. In the Notice we detailed instances where the time of broadcast of certain announcements for Midas Mufflers as certified to Well, Rich Green, Inc. varied substantially from the actual time of broadcast of the announcements as indicated by the KLAS–TV program logs. This variance of broadcast time resulted in some instances in sponsors paying the higher rate for Class AA commercial announcements, but receiving Class A or B commercial announcements, which are sold at a considerably lower rate. However, the licensee's showings concerning the invoices issued to Charleston TV & Appliance and rendered on invoice stationery bearing the name of the previous licensee have been considered and in view of them we are persuaded to reduce the amount of apparent liability from four thousand dollars ($4,000) to two thousand dollars ($2,000).

5. In view of the foregoing, IT IS ORDERED, That Summa Corporation, licensee of Television Station KLAS–TV, Las Vegas, Nevada, FORFEIT to the United States the sum of two thousand dollars ($2,000) for willful failure to observe the povisions of Section 73.1205 of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for remission or mitigation of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Summa Corporation, licensee of Television Station KLAS–TV, Las Vegas, Nevada.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1023

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of:
TELEMUNDO, INC., MAYAGUEZ, PUERTO RICO
Request for Emergency Authorization Pursuant to Section 309(f) of the Communications Act of 1934, as Amended — File No. BPTT-2452

ORDER

(Adopted November 15, 1972; Released November 21, 1972)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. The Commission has before it for consideration the above-captioned application (BPTT-2452), filed November 1, 1972, by Telemundo, Inc., licensee of television station WKAQ-TV, channel 2, San Juan, Puerto Rico, requesting a construction permit for a new 1,000-watt UHF television broadcast translator station to operate on assigned and unused channel 22, Mayaguez, Puerto Rico. Simultaneously, the applicant filed a request for emergency special temporary authority, pursuant to section 309(f) of the Communications Act of 1934, as amended, and section 1.580(b) of the Commission's rules, to commence immediate construction and operation of the translator, except that it would operate with transmitter output power of 100 watts temporarily until it can obtain and install the equipment required for the 1,000-watt station.

2. The applicant states that the programs of station WKAQ-TV are carried in Mayaguez over the facilities of station WMGZ-TV, channel 16, Mayaguez, Puerto Rico, which is authorized to Telesanjuan, Inc., and have been carried in similar fashion in Mayaguez, by one or another television station, for 14 years. Mayaguez is a city of more than 86,000 people which, because of the terrain of Puerto Rico, is unable to receive the signals of San Juan television stations directly from San Juan.[1] The applicant states that, on October 25, 1972, it learned that Telesanjuan had informed the Commission, during the course of the hearing in Docket Nos. 19353-19355 (involving the authorization of station WMGZ-TV, among others held by Telesanjuan), that, effective the end of the broadcast day on November 30, 1972, the operation of station WMGZ-TV would be permanently discontinued. When this occurs, the programming of station WKAQ-TV, which had been received in Mayaguez from station WMGZ-TV, will be lost unless a method is found to continue that service. With this end in view, Telemundo filed its application (BPTT-2452) for a construction permit

[1] For this reason, San Juan stations WRIK-TV, channel 7, and WAPA-TV, channel 4, are carried in Mayaguez by station WORA-TV, channel 5, and WOLE-TV, channel 12, respectively.

for regular authority to construct and operate a 1,000-watt UHF translator on channel 22 in Mayaguez. The applicant does not have on hand the equipment required for the 1,000-watt operation, but it does have available for immediate use a 100-watt UHF translator which needs only retuning for operation on channel 22. Because of the necessity to be operational prior to the cessation of broadcasting by station WMGZ–TV, the applicant has requested authority to use its 100-watt translator to provide emergency service until the Commission acts upon its application for a 1,000-watt translator and the necessary equipment can be obtained, installed and placed into operation.

3. We think that it is clearly in the public interest to prevent the loss of a program service which a community of more than 86,000 persons has had available for 14 years. The proposal appears to us to be the most feasible method to achieve this purpose. Grant of the application for a 1,000-watt translator is authorized by law, but is precluded by the proscriptions of section 309(b) of the Communications Act because it has not been on file 30 days since the Commission gave public notice of the acceptance of the application for filing. We find, for the reasons stated, that there are extraordinary circumstances requiring emergency operations in the public interest and that delay in the inauguration of the replacement television service would seriously prejudice the public interest. We will, therefore, authorize, on an emergency basis, operation of the translator with 100 watts transmitter output power.

4. Accordingly, IT IS ORDERED, That, pursuant to section 309(f) of the Communications Act of 1934, as amended, and section 1.580(b) of the Commission's Rules, the request of Telemundo, Inc., for emergency special temporary authority IS GRANTED, until February 15, 1973, in accordance with specifications to be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-66

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF TRI-STATE BROADCASTING CO., INC., LICENSEE OF RADIO STATION KDIO, ORTONVILLE, MINN. 56278
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted January 17, 1973; Released January 22, 1973)

BY THE COMMISSION: COMMISSIONERS H. REX LEE, REID AND WILEY CONCURRING IN THE RESULT.

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated September 24, 1971 addressed to Tri-State Broadcasting Company, Inc., licensee of Radio Station KDIO, Ortonville, Minnesota, and (2) the licensee's response to the Notice of Apparent Liability dated October 7, 1971.

2. The Notice of Apparent Liability for forfeiture in the amount of seven hundred dollars ($700) was issued for apparent willful or repeated failure to observe the provisions of Section 73.99(b)(2) of the Commission's Rules and the station's Presunrise Service Authority, by operating during presunrise hours from November 15 to November 30, 1970 between 6:00 a.m. and 7:30 a.m. Central Standard Time (CST) and from December 1 to December 17, 1970 between 6:00 a.m. and 8:00 a.m. CST on all days except Sundays, with power of 547 watts.

3. KDIO has a Presunrise Service Authority for operation from 6:00 a.m. local time to local sunrise with power of 500 watts. The station's basic instrument of authorization provides for regular daytime operation with 1000 watts commencing at 7:30 a.m. CST during November and at 8:00 a.m. CST during December.

4. In response to the Notice of Apparent Liability, licensee requests that the Commission not issue an Order of Forfeiture, stating that the violations were not willful but were solely caused by its error in using an incorrect radiation resistance of 32.2 ohms instead of 34.2 ohms in computing the antenna current necessary to operate with power of 500 watts. The first license issued to KDIO on September 7, 1956 specified an antenna resistance of 34.2 ohms. This value was again specified in the certificate of renewal issued May 21, 1971. Apparently the licensee failed to refer to its instruments of station authorization but rather relied upon a figure created by an error in copying from the license.

5. We have considered licensee's reply and the circumstances of this case and we are not persuaded to mitigate or remit the forfeiture. We

find that the violations were repeated, and therefore find it unnecessary to make any determination as to their willfulness. *Paul A. Stewart*, FCC 63–411, 25 RR 375.

6. In view of the foregoing, IT IS ORDERED, That Tri-State Broadcasting Company, Inc., licensee of Radio Station KDIO, Ortonville, Minnesota, FORFEIT to the United States the sum of seven hundred dollars ($700) for repeated violation of Section 73.99(b)(2) of the Commission's Rules and failure to observe the terms of its Presunrise Service Authority. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Tri-State Broadcasting Company, Inc., licensee of Radio Station KDIO, Ortonville, Minnesota.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-42

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.606(b), TABLE OF ASSIGNMENTS, TELEVISION BROADCAST STATIONS (GRAND JUNCTION, COLO.)	Docket No. 19539 RM-1852

REPORT AND ORDER

(Adopted January 10, 1973; Released January 15, 1973)

BY THE COMMISSION: COMMISSIONER HOOKS ABSENT.

1. The Commission has before it for consideration the proposal to assign Channel 8 to Grand Junction, Colorado, upon which rule making was instituted in response to a petition of Woodland Broadcasting Company (Woodland), licensee of Radio Station KBUC(AM), Montrose, Colorado. (*Notice of Proposed Rule Making*, adopted July 6, 1972, 37 Fed. Reg. 14001.) Both supporting comments and reply comments on the proposals were received from Woodland. Opposing comments were filed by XYZ Television, Inc. (XYZ), licensee of Station KREX-TV (Channel 5), Grand Junction, and also of Station KREY-TV (Channel 10), Montrose, and Station KREZ-TV (Channel 6), Durango, Colorado, both satellites of Station KREX-TV.

2. Channel 5 and Channel *18, reserved for noncommercial educational use, are assigned to Grand Junction (1970 population, 20,170), the largest city and seat of Mesa County (1970 population 54,347), located in southwestern Colorado, approximately 190 miles southwest of Denver and southeast of Salt Lake City, Utah. Channel 5 is occupied by Station KREX-TV which was under other ownership from 1954 to 1966, and has been under XYZ's ownership since 1966.[1] Channel *18 has never been activated. Station KREX-TV and its two satellites, Station KREY-TV at Montrose (1970 population 6,596), about 55 miles southeast of Grand Junction, and Station KREZ-TV at Durango (1970 population, 10,333), about 90 miles south of Montrose, all under XYZ's ownership, are the only local television stations serving this western Colorado area.

3. Additional service is, however, received from television stations outside western Colorado via numerous translators and local cable TV systems at Grand Junction, Montrose and Durango. The 1972-73 edition of *Television Factbook* indicates that the Grand Junction cable system, which has been in operation since 1966, carries KREX-TV

[1] An application for voluntary transfer of control of XYZ Television, Inc., to Rex G. Howell, who had a controlling interest in the prior licensee of Station KREX-TV (Western Slope Broadcasting Company, Inc.), which also had controlling interests in licensee corporations for Station KREY-TV at Montrose and Station KREZ-TV at Durango, was granted August 11, 1972, File No. BTC-6683. Notice of consummation of the authorized transfer of control was filed in an ownership report, as of October 13, 1972.

(Grand Junction) and all five of the Denver television stations (KWGN–TV, KOA–TV, KLZ–TV, KBTV and KRMA–TV). The Montrose cable system, which also began operation in 1966, carries KREY–TV (Montrose), KOAA–TV (Pueblo, Colo.), and all of the Denver stations. The Durango cable system, which began operation in 1954, carries KREZ–TV (Durango), the four Albuquerque, New Mexico, television stations (KOB–TV, KOAT–TV, KNME–TV, and KGGM–TV), and two of the Denver stations (KRMA–TV, KWGN–TV).

4. This Channel 8 proposal for Grand Junction merited consideration in rule making, we felt, since the Woodland petition demonstrated that Channel 8 is technically feasible for a Grand Junction assignment; evidenced interest and intent on the part of its controlling stockholders and others to apply for use of the channel, if assigned, to provide Grand Junction, Mesa County, and this western Colorado area with a second full-fledged local commercial television outlet and service; and it appeared that the proposed assignment could implement our television goals and policies and serve a significant public interest function and need in making it possible for this area to have a first comparable and competing local television outlet and diversified off-the-air local television service from another source. While XYZ opposed rule making on the proposal on the basis of claims that a second VHF station at Grand Junction would be economically infeasible and would seriously jeopardize present television service in the area, its showing was insufficient to warrant either conclusion or to evaluate the significance of these claims in terms of the public interest. For, as we pointed out in the Notice, the Commission's Table of Assignments is not static and existing licensees are not entitled to a protection from additional assignments which might have a possible adverse effect on their private economic interests. We did, however, invite comments in particular in this regard.

5. In its comments, Woodland affirms that it or another company having the same majority stockholders (Four States Television, Inc., permittee of Station KIVA–TV, Farmington, New Mexico), or some of the principals of these companies and others intend to apply for Channel 8 at Grand Junction, if assigned, and to utilize it, if authorized. Relying on its prior showing, Woodland urges that the assignment is clearly warranted on the basis of technical feasibility, need, and the significant public interest benefits flowing from the establishment of a second local television outlet and service in this area. This being the case, Woodland takes the position that the assignment should not be withheld because of economic considerations, such as those previously raised by XYZ, in the absence of a compelling showing that the public interest would be adversely affected thereby. It maintains that its position is consistent with established Commission policy and precedent; that in a number of cases we have made it clear that where a choice of free television service would be available for the first time, there is a strong presumption that the second television channel should be assigned to the community involved and that we should be slow to act in a manner which would thwart the development of competition, citing the 1969 *Glendive, Montana* VHF channel assignment case (19 F.C.C. 2d 733, 15 Pike & Fischer, R.R. 2d 1559) as an example. Among

the other consistent cases, it states, is the 1970 *Oxnard, California*, TV channel assignment case (35 Fed. Reg. 16173; 20 Pike & Fischer, R.R. 2d 1570), wherein we stated that "it is not the Commission's function to place artificial restraints upon competition unless the overall public interest will be adversely affected by such competition" and that "such arguments, even if of substantial merit, are better considered at the application stage, where they can be evaluated in light of the specific application proposal."

6. In its opposing comments, XYZ takes essentially the same position as previously taken in opposition to rule making on the proposed Grand Junction Channel 8 assignment, specifically claiming that the addition of a second VHF station at Grand Junction would be detrimental to the public interest since neither station would be able to obtain sufficient economic support to provide a viable service in the public interest. In support of this position, XYZ contends that it is inconceivable that two television stations could provide viable services in a market as small as that served by Station KREX–TV at Grand Junction and its Montrose and Durango satellites considering the extent to which it is now blanketed with television signals being brought in by cable TV systems and translators. XYZ states that, according to American Research Bureau ranking (ARB), there are approximately 61,000 homes in the area served by Station KREX–TV and its Montrose and Durango satellites; that in excess of 35 percent of these homes are served by cable TV systems; and that, coupled with those served by translators, the penetration of outside service is approximately 70 percent. XYZ further contends that the proliferation of signals in the market has resulted in a continuous decline in the number of homes reached by Station KREX–TV since 1965 and submits an exhibit, prepared from ARB surveys, to show that for every daily time period the number of homes watching KREX–TV and its satellites had declined in May 1972 to approximately one-half of its March 1965 level. In an accompanying statement the president of XYZ states that the number of homes reached is now at a dangerously low level. Estimating that this level would be cut in half again by moving in another television station, he contends that this would not leave sufficient homes for either station to service.

7. In addition, XYZ argues that the Grand Junction area does not represent a growth area which will need additional service in the future, citing U.S. Census Reports to show that it is one which has barely maintained its level of population in the decade from 1960 to 1970. In that ten-year period, final United States Census reports show that Grand Junction increased from 18,694 to 20,170 in population (a 7.9 percent increase) and that Mesa County increased from 50,715 to 54,374 in population (a 7.2 percent increase). In the neighboring counties of Montrose and Delta, there was only a slight population increase in one (Montrose increased from 18,286 to 18,366, a 0.4% increase) and a loss in population in the other (Delta decreased from 15,602 to 15,286, a 2.0% decrease) between 1960 and 1970. The city of Montrose, however, increased in population from 5,044 to 6,496 (a 28.8 percent increase) during the ten-year period. The XYZ president maintains that without population growth to support an additional station, there is nothing left but fragmentation of the already small

audience of the present station and that two commercial stations in as small a market as shown by these population figures do not have any hope of surviving.

8. In reply, Woodland contends that the XYZ showing is devoid of any facts to show that the proposed assignment would be contrary to the public interest and of even sufficient facts to show private economic injury to Station KREX–TV. It stresses that even assuming, for the sake of argument, that a showing of some private economic injury had been made, the Commission and the Courts have consistently held that allegations of private economic injury, standing alone, without any showing of how the public interest would be adversely affected in terms of loss of service is an insufficient ground for keeping out a competitive service (*Carroll Broadcasting Co.* v. *F.C.C.*, 258 F.2d 440 (C.A.D.C., 1958)). Contending that XYZ's showing constitutes no showing whatsoever as to whether there would be a net loss of service resulting from the institution of a first competitive commercial television service in Grand Junction, and that XYZ has clearly failed to rebut the strong presumption applied by the Commission in favor of additional assignments, Woodland urges rejection of the XYZ position and adoption of the proposed amendment in light of its public interest benefits.

9. There is no question, we believe, that the public in the Grand Junction area would benefit greatly from having a second locally-oriented commercial television broadcast service available to all in the area from a source other than XYZ, notwithstanding the translator and cable TV service available to many in the area. Providing an assignment to make this possible is also consistent with our television priorities and assignment policies. We are also satisfied that Channel 8 is technically feasible for such use at Grand Junction. In addition, based on the indicated interest and intent of Woodland, an experienced radio broadcaster in the area, and its principals and others, there appears every likelihood that a Channel 8 assignment at Grand Junction would be applied for and that, if a new station is authorized on the channel, it will be built and placed in operation. These considerations are sufficient, in our judgment, to warrant the assignment in the public interest without reaching a decision on the economic impact question raised by XYZ. It is our normal practice to make ultimate decisions in this regard when we have an application with a specific proposal for use of a channel assignment rather than in the context of a rule making proceeding for the assignment itself. We think that this is the better procedure since any possible adverse economic effect of a new station becomes a critical factor in weighing the public interest at such time as we are required to act upon an application for a new station rather than at the assignment stage, and it is exceedingly helpful to have a specific proposal before us which can, if necessary, be exposed to the give-and-take of an evidentiary hearing in making a determination as to whether the alleged economic impact of the proposed new station is likely to cause over-all derogation of television service to the public.

10. This rule making proceeding, we feel, points up the difficulty, if not virtual impossibility, in most such proceedings of making a determination as to the alleged adverse economic effect of a new station on a proposed channel assignment without benefit of an applica-

tion with a specific proposal for use of the proposed assignment to consider, as well as the need and desirability of adhering to our practice of considering any such applicant's proposal in reaching a reasoned judgment on such economic issues. XYZ's showing as to the size and population growth pattern of the Grand Junction area and the alleged impact of translator and cable TV operations upon its Channel 5 station and audience furnishes some reason, we feel, for questioning the ability of the relatively small Grand Junction market—the 189th ranking market, based on prime time viewing households, according to ARB market rankings, as of February/March, 1972—to support another station, but neither on the basis of its showing nor our experience can we conclude, that it is impossible. More important, its showing is insufficient, in our view, to permit a determination as to whether the alleged adverse economic effect of another station in the Grand Junction area is likely to cause diminution or destruction of overall program service to the public. In the absence of such a showing, we would not deny an application for a new station on grounds of economic injury to an existing station since, as we have stated before, it is not our function to place artificial restraints upon competition unless the overall public interest would be adversely affected thereby. Nor, on the strength of XYZ's showing in this regard, do we think that it would serve the public interest to relegate the Grand Junction area to being essentially a market for one regular local station and one voice for lack of an assignment. The public interest is served, we believe, in view of the demand for the proposed assignment and its technical feasibility, by not closing the door to opportunity for the Grand Junction area to have a second comparable commercial television service from another source at this time. The economic impact question in terms of the public interest can be better evaluated, and in greater depth, in passing upon any applicant's proposal for use of the new assignment.

11. Accordingly, pursuant to the authority contained in Sections 4(i), 303, and 307(b) of the Communications Act of 1934, as amended, IT IS ORDERED, That the television Table of Assignments, Section 73.606(b) of the Rules, IS AMENDED, effective February 23, 1973, insofar as the community named is concerned, to read as follows:

City	*Channel No.*
Grand Junction, Colo	5-, 8-, *18

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-40

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 73 OF THE COMMISSION'S RULES AND REGULATIONS WITH RESPECT TO MAINTENANCE AND MONITORING OF THE RELATIVE PHASES AND CURRENTS IN THE ELEMENTS OF DIRECTIONAL ANTENNAS AND TO PROVIDE FOR TYPE APPROVAL OF PHASE MONITORS USED BY STANDARD BROADCAST STATIONS	Docket No. 18471

REPORT AND ORDER

(Adopted January 10, 1973; Released January 15, 1973)

BY THE COMMISSION: COMMISSIONER HOOKS ABSENT.

1. This proceeding contemplates amendment of Part 73 of the Commission's Rules and Regulations to:

(1) Require the installation and use of a type approved phase monitor by every standard broadcast station employing a directional antenna.

(2) Specify the maximum permissible deviation in the relative phases of the currents in a directional antenna as ± 2 degrees from the licensed values.

(3) Set forth the essential specifications for phase monitors eligible for type approval.

Rules also were proposed for the procedures applicable when a phase monitor becomes defective. Comment was requested on the question of "grandfathering" existing phase monitors in instances where they would not be used to provide phase indications at a remote control point.

2. After full consideration of all comments filed, we are adopting rules with respect to these matters, except for (2), above. For the reasons discussed herein, we are not specifying permissible phase deviations.

3. In the Notice of Proposed Rule Making in this matter, released February 28, 1969, filing deadlines for comments were specified as April 7, 1969, and for reply comments as April 17, 1969. The dates were extended by subsequent orders to July 9, 1969 and August 8, 1969, respectively. Thirty-eight separate comments were filed in this proceeding, representing the views of many station licensees, networks, individuals, engineering and trade associations, consulting engineers, and the designers and manufacturers of phase monitors. There was one reply comment. The roster of the parties is as follows:

Michael C. Rice
George W. Harvey
Frank S. Colligan (Colligan)
Ralph J. Bitzer (Bitzer)
Kear & Kennedy
A. Earl Cullum and Associates (Cullum)
J. G. Rountree (Rountree)
H. W. Holt
J. B. Hatfield (Hatfield)
Carl E. Smith Consulting Engineers (Smith)
Walter F. Kean (two separate filings, identical in substance in behalf of two different groups of station licensees) (Kean)
Association of Federal Communications Consulting Engineers (AFCCE)
National Association of Broadcasters (NAB)
Clear Channel Broadcasting Service (CCBS)
Association for Broadcasting Standards (ABS)
American Broadcasting Companies, Inc. (ABC)
National Broadcasting Co. (NBC)
Columbia Broadcasting System, Inc. (CBS)
Westinghouse Broadcasting Co. (Westinghouse)
Storer Broadcasting Co. (Storer)
United Broadcasting Company of New York, Inc. (UBC)
Rollins, Inc.
Newhouse Broadcasting Corp.
WRVA Radio, Inc. (WRVA)
Susquehanna Broadcasting Co.
McLendon Corp.
Rice Communications, Inc. (Rice)
Streator Broadcasting Co.
Steere Broadcasting Co.
Mesabi Western Corp. (Mesabi)
KNCY Radio Corp.
WEEU Broadcasting Corp. (WEEU)
Emerald Broadcasting Corp.
Mobil Videotapes, Inc.
James A. Noe (Noe)
John K. Birch (Birch)
Defense Electronics
Potomac Instruments, Inc. (Potomac)

4. There was a virtual consensus among those commenting concerning two of the main proposals of the Commission, viz:

(1) That the proposed maximum permissible phase deviation of ± 2 degrees as an absolute limit is too restrictive in the great majority of cases.

(2) That the Commission should require type approved phase monitors in instances where licensees propose to observe and log phases at their remote control points. In other instances, stations should be permitted to retain their present monitors (be "grandfathered").

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5. There were also a number of helpful criticisms and suggested changes of the proposed rules governing the replacement of a defective monitor, and of the technical requirements which we had proposed for type approved monitors.

6. While, in the light of the preponderance of the comments, our proposal to limit phase deviations to ±2 degrees might appear unrealistically restrictive, it had the effect, which a more moderate proposal might not have had, of provoking a productive discussion of many of the problems involved in maintaining a directional antenna in proper adjustment. It is regretted, however, that the proposal was not of such a nature as to elicit an equally thorough discussion of the problems presented by varying monitoring point values. Many of those commenting took the position that the definitive indicia of proper array adjustment are proper monitoring point values, and either stated or implied that any variation in indicated phase differences and current ratios should be permissible so long as the monitoring point field strengths remain within licensed limits.

7. While several of those commenting stated that a permissible deviation of ±2 degrees might be acceptable as a basic tolerance, nearly all wanted any rule setting such a tolerance to provide for temporary deviations beyond this limit during unfavorable weather conditions. It was pointed out that any tolerance which is reasonable under normal conditions may be exceeded when there is heavy rain, snow or icing, or abrupt and substantial changes in temperature. To what extent such excessive deviations reflect actual changes in the parameters of the array, or the effects of precipitation or temperature changes on the sampling system usually cannot be ascertained. It appears that both are affected, the latter less drastically when it is properly designed and installed. Indicated tower current ratios, as well as relative phases are affected by such weather conditions. Kear and Kennedy and Defense Electronics suggest language for rules which would take into account these effects both as to phase relationships and current ratios. Subject to appropriate qualification to provide for greater deviations under unfavorable weather conditions (notations in the operating log would be made when such conditions occurred) there was considerable sentiment for a phase tolerance of ±3 degrees, since a deviation of this amount in phase produces an effect roughly equivalent to a 5 percent deviation in current ratio, a limit already set forth in the rules.

8. Others suggested tolerances of ±4 degrees and ±5 degrees, or no tolerance at all. Kean stated that even a tolerance of ±5 degrees would be insufficient to accommodate variations caused by annual or short term environmental changes. However, Susquehanna considered this tolerance sufficiently high to accommodate such changes.[1]

9. In some instances, parties who favored setting no limit at all, by rule, on phase deviations, suggest that limits be specified in the instrument of authorization for each station. They argue that in some directional antenna designs the effect on the pattern of a phase change

[1] Bitzer and Rountree argue that if the tolerance for phase deviations is made too small, operators will be impelled to make phasor adjustments to bring phase indications back within tolerance. They hold that most operators do not possess the technical competence to make these adjustments, and the result of such a practice can be a misadjustment of the directional antenna. On the other hand, some licensees claim that too tight a tolerance will prevent them from making changes in phase relationships when such changes appear necessary to keep monitoring point readings within their licensed limits.

of a stated amount is far greater than in others. Also, the requirements for the protection of other stations vary markedly from case to case. Thus, a phase deviation of a magnitude which results in objectionable interference to other stations in one instance may be of little significance in another. Accordingly, no single value for permissible deviation should be set for all stations—rather, permissible deviations should be specified for each station in its license in the light of its antenna characteristics and its protection obligations.

10. It was emphasized by many of those commenting that even under normal weather conditions, changes in phase monitor indications may reflect, not so much changes in the antenna parameters, as changes in the phase sampling system. The importance of the proper design, installation and maintenance of such systems was stressed. Several parties urged that if a rule requiring type approved phase monitors is to result in improved surveillance of directional antenna operation, it must be supplemented by rules establishing at least minimum standards for the installation of sampling systems. Alternatively, it was suggested that each licensee installing a type approved phase monitor be required to make a full disclosure of the details of the associated sampling system. There is a considerable area of agreement as to the basic requirements for such systems. Some parties, Cullum and Colligan, in particular, went into considerable detail as to the specific features of a satisfactory sampling system, Cullum emphasizing mainly the electrical characteristics, and Colligan the details of physical construction.

11. The proposition was advanced that indicated phase or current deviations beyond normal tolerance should not be considered as a definitive indication that a directional antenna is out of adjustment, but serve only as a warning of possible trouble, calling for an immediate investigation of the whole system, and a check of monitoring point field strengths. Thus, indicated deviations of these parameters beyond specified tolerances observed by a Commission engineer should not, standing alone, justify the serving of a citation for improper operation. It was suggested that stations experiencing excessive deviations should enter in their maintenance or operating logs the apparent cause of the deviations, if ascribed to temporary weather conditions, or, if not reasonably explicable on this basis, the measures that have been taken to ascertain that the array continues in proper adjustment.

12. There was general agreement that, as the Commission proposed, a phase monitor type approved for the provision of remote indications should be required if a station licensee undertakes to observe and log phase indications at a remote control point pursuant to rule amendments proposed in Docket 18455. In other cases, immediate installation of a type approved monitor should not be required. A number of those commenting favored "grandfathering" of existing monitors for unlimited periods of time. Others would establish firm deadlines, or cite circumstances under which the installation of type approved monitors would be required.

13. Opinions as to the period of grace to be allowed before type approved phase monitors be required for all stations ranged from one year (Smith) to six years (NAB). Many favored a period of about 5 years, with the proviso that, if a major change in the directional

array is authorized within that period, it should be the occasion for the installation of a type approved phase monitor (NBC, CBS, Storer). CCBS noted that if a station has a history of difficulty in maintaining its directional pattern within licensed limits, the burden should be placed on the licensee for demonstrating that its phase monitor is adequate.

14. WEEU, McLendon and UBC request that in any rules adopted in this proceeding or in Docket 18455, it be made quite clear that type approved phase monitors will not be required at this time if phase monitor sample currents, but not phase indications, are observed at a remote control point. They state that sample current indications are used by many stations at remote control points to provide the "indications . . . of . . . remote base current meters" which Section 73.67(a)(5) of the Rules states are to be read and entered in the operating log each half hour.[2]

15. Section 73.69(b)(5) of the proposed rules would require, if a defective phase monitor is replaced by another monitor, "a skeleton proof of performance, consisting of measurements of three or four consecutive points on each radial used in the original application, shall be submitted to the Commission within 60 days of the date the replacement monitor is placed in service".

16. Mesabi, WRVA, NAB, AFCCE, and CBS comment on and generally take exception to the above requirement. A summary of their comments and suggestions follows:

Mesabi: If the new phase monitor shows different readings than the old, the new phase readings should be accepted as direct replacements for the corresponding values shown on the old. The license should be modified to reflect these new values without a further proof of performance.

WRVA: A skeleton proof should not be necessary if readings of new monitors are in agreement with the terms of the license. Monitoring point measurements should provide additional proof the directional antenna is functioning normally.

NAB: No skeleton proof should be required if satisfactory evidence is submitted that no material change has occurred in DA operation.

AFCCE: If the monitor becomes defective and is replaced by another type which gives changed indications, a skeleton proof should be required.

CBS: A skeleton proof should not be required in all cases of phase monitor replacement—it depends on the circumstances. If there is reason to suspect trouble in the antenna, a proof should be made. However, the simple replacement of one monitor by another should not occasion it.

[2] The occasion for this concern arises from a conflict between the clear intent of the rule, and the adoption of practices by broadcasters at odds with this intent, which, nevertheless, have been sanctioned on an informal basis by the Commission. The Report and Order in Docket 11677, which adopted the present rules concerning operation of stations with directional antennas by remote control clearly indicates that the language of the rule means exactly what it says—that indications of base currents must be read at the remote control point. McLendon's argument that sample currents provided at the transmitter for the phase monitor satisfy this requirement is not persuasive. Many of the parties commenting in this proceeding have emphasized the differences between the indications of array element field ratios derived from base current indications and from phase monitor samples—arguing that the latter more accurately reflect the actual field ratios than do the former. It is clear, however, that these parties contemplate the phase monitor samples will be obtained from loops mounted above ground on each element of the array. In some cases the phase monitor samples are not so derived—they are obtained by coupling to the transmission line at the base of the tower. Only in such cases (which are in the minority) could sample currents properly be considered as "indications of the base currents".

Despite the language of the rule, the Commission has permitted the output of phase monitor sampling lines, whether obtained by loop or base coupling, to be transmitted to remote control points to be read and logged in satisfaction of the requirement that indications of base current be read and logged. We do not contemplate that licensees presently following this practice will be required to acquire type approved phase monitors at this time. However, it appears obvious that any rule adopted should specifically provide for the reading of phase monitor sample currents at a remote control point in lieu of indications of base currents so that the existing anamolous situation may be corrected.

17. A number of criticisms and suggestions were offered regarding the specifications for type approved monitors, viz: Proposed rule 73.53(b)(5) reads "The required accuracy shall be met when the carrier is either modulated or unmodulated". Storer questions whether such a blanket requirement could be met by any phase monitor when the carrier is assymetrically modulated and peaks exceed 100 percent. It suggests that the phase monitor should be required to maintain its specified accuracy with sine wave modulation over a range of zero to 90 percent. Birch has a similar reservation, stating that any phase monitor will register an erroneous reading for the duration of peaks with negative modulation of 100 percent. He suggests that the accuracy figure should be maintained up to a level of negative modulation of about 95 percent. Potomac urges that the accuracy be specified under conditions of "sine wave modulation from zero to 95 percent at modulation frequencies from 50 Hz to 15 kHz; also with typical program material exhibiting negative modulation peaks up to 98 percent".

18. The proposed rules do not require that a type approved monitor include means for indicating the relative amplitudes of loop currents, specifying only a required accuracy if such facilities are included. Birch and Potomac Instruments take strong exception to any rules which do not make mandatory the provision of these facilities in the monitor. CBS also urges that loop current indicators be incorporated in the monitor.

19. For loop current indications, Colligan would include a requirement that they be linear to within 2 percent over a range from 5 percent of full scale to 95% of full scale.

20. CBS suggests that the performance of the monitor be stated in terms of its "resolution" rather than its accuracy. Birch and Potomac favor separate specifications for accuracy and "resolution" (both would specify the latter as 0.5 degrees). Resolution, as Potomac construes it, apparently is synonymous with "repeatability".

21. Birch and Potomac each suggest that proposed 73.53(b)(1) be revised to specify that the phase differences be indicated between a reference RF input and other RF inputs, rather than "between any two RF input points", since the former is the indication directly made by phase monitors of modern manufacture.

22. Both suggest additional requirements, particularly applicable to the monitor when used for remote indication, which would insure that accurate remote point readings could be achieved without adjustment or calibration of the monitor, and that internal circuitry is included to permit the monitor to be switched among the various elements of the array from the remote control point.

23. Potomac urges that we further include the requirement that the specified accuracy of the monitor be maintained within temperature variations of ± 15 F about the temperature at which the monitor was calibrated, and with sampling line voltage changes 3 db above and 6 db below the nominal input voltage.

DISCUSSION

24. In the light of the comments received, we will not now adopt a rule specifying a fixed permissible phase deviation for stations with directional arrays. We think that phase tolerances ultimately should

be set by the Commission. Ideally, permissible deviations in relative phases and current amplitudes should be specified for each station in its instrument of authorization in the light of its antenna characteristics and its obligations for the protection of other stations. This, of course, is now done for stations having unusually rigid protection requirements. Practical and equitable considerations might militate against its accomplishment on an overall basis. A considerable burden would be placed on each station licensee in preparing the engineering study necessary to define the limits for his particular station. Moreover, a specific procedure for making such studies must be developed and presumably must be prescribed by the Commission if uniform and consistent determinations are to be made by all stations. At present, no generally accepted procedure exists.

25. Even if a case-by-case approach should not prove feasible, the establishment by rule of a fixed tolerance for phase variations for all stations with directional antennas, with suitable provision for excessive deviations because of weather and other adverse conditions, is desirable in insuring that antennas do not drift out of adjustment because of aging or defective components, or are not misadjusted by station operators. Such a requirement would be fully consistent with the long standing Commission rule requiring the maintenance of current ratios within 5 percent of the values specified in the station license. If this approach were adopted, we think a tolerance of ± 3 degrees might be appropriate. Not only is the effect of a deviation of this amount approximately equivalent to a variation in current ratio of 5 percent, but it would appear, in the light of the comments, that under normal weather conditions reasonably stable directional antennas can operate within such a tolerance without frequent readjustments.

26. However, the successful application of a tolerance for phase deviations requires that such deviations be accurately detected. It is quite evident from the tenor of the comments that the phase monitoring systems of many stations are incapable of providing consistently accurate indications of phase or phase deviations. Almost unanimously, those commenting lay the blame for this situation on sampling systems which are inadequately designed and improperly installed. Where such systems are employed, indicated phase deviations may reflect variations in the sampling system with changes in temperature, moisture, wind velocity, etc., or deterioration of components of the system, rather than any real change in antenna phase relationships.

27. At least one comment suggests that faulty sampling systems are so numerous that, unless the situation is corrected, it is futile to require type approved monitors. Others have urged that the Commission establish at least minimum standards for the installation of sampling systems, or that each station installing a type approved monitor be required to make a showing that the sampling system to be employed therewith is adequate.

28. On the basis of the comments, we are convinced that the incidence of faulty and inadequate sampling systems is so general that any attempt by the Commission to fix and require compliance with a specific phase tolerance at this time will result, not in better maintenance of radiation patterns, but, in many cases, unnecessary and perhaps deleterious readjustments of array parameters.

29. There was a tendency on the part of some parties to minimize the importance of phase monitor readings in determining the performance of an array, and to look to the results of monitoring point measurements as the definitive indicia of proper array adjustment. Where a phase indicating system cannot be relied upon to provide accurate indications, monitoring point measurements become almost the sole basis for pattern maintenance. However, as many consulting engineers and station operators well know, monitoring point fields have their own peculiar vagaries, which must be recognized and accounted for.[3] The practice of making arbitrary changes in array operating parameters in attempts to maintain measured fields within prescribed limits often has resulted in situations where complete reproofs of arrays have become necessary.

30. We share the conviction of those parties who believe that an accurate and reliable system for determining phase relationships is an essential adjunct to proper directional antenna operation, and to the extent licensees do not now have such systems, steps should be taken to correct this situation.

31. We therefore believe that the adoption of rules for the type approval of phase monitors, and providing for the eventual installation of such monitors by all stations using directional antennas is an important step toward the improvement of the technical operation of these stations. However, it is apparent, in view of the comments received, that the problem of achieving better surveillance of antenna operations is not thereby completely solved—that little is gained by requiring the use of a monitor giving accurate and stable indications of the relationships of antenna signals delivered to its terminals, if these signals are subject to errors introduced by a faulty sampling system. Accordingly, in the near future we expect to institute a new rule making proceeding looking toward the adoption of rules which would set minimum standards for sampling systems. In the instant proceeding we have received a number of suggestions concerning this question, and will rely on them extensively in formulating the proposed standards.

32. As previously indicated, several of the parties urge that type approved phase monitors not be required when loop current indications, but not phases, are read at the remote control point. This matter is disposed of in the Report and Order in Docket No. 18455, which we are issuing simultaneously with this document.

33. Since the inception of the instant proceeding, we have concluded rule making in Docket 18930, and have amended § 73.93 of our radio operator rules so as to permit, subject to specified conditions, the routine operation of standard broadcast stations with directional an-

[3] It should be noted that it is common practice to use phase monitor current indications in lieu of base current indications in determining element current ratios in an array. While this is often a matter of convenience, a number of those commenting held that loop current ratios are a more accurate indication of relative element fields than are base current ratios. In view of the apparent inadequacy of many sampling systems for presenting phase differences, a question is raised as to the accuracy with which such systems can provide information on current ratios. While this matter has not been discussed to any extent by those commenting, it would appear that the factors which adversely affect the accuracy of phase indications in general have considerably less effect on current ratio indications. However, Kear and Kennedy and Defense Electronics both suggest that the rule setting the tolerance for current ratios be modified to provide for deviations resulting from adverse weather conditions.

tennas by licensed operators other than first class radiotelephone licensees. Among the conditions precedent to the use of lesser grade duty operators is a requirement that the station be equipped with a type approved antenna (phase) monitor. The effectiveness of this requirement was suspended, however, pending the conclusion of the instant proceeding. In the appended rules we have specified an effective date of June 1, 1974. An appropriate amendment of § 73.93 will be made in the immediate future.

34. As suggested by several of the parties, we are requiring the installation of type approved monitors by all new stations employing directional antennas, and by all stations using such antennas which are authorized to make major changes.

35. Of course, the particular circumstance which impelled us to undertake the type approval of phase monitors was the NAB proposal that we permit phases to be logged at remote control points (with a concomitant relaxation in the frequency of readings at the transmitter). While deeming the proposal as meritorious, we concluded that reasonable assurance remote phase indications would be satisfactorily provided must rest in the mandatory requirement that the licensee install a phase monitor which the Commission had determined was properly designed for remote indication and operation.

36. However, as a result of preliminary testing of available monitors by our Laboratory, and incident to the development of type approval specifications for these instruments, we have modified to some extent our position that a type approved monitor must immediately be employed in all cases by stations undertaking to provide phase indications at a remote control point.

37. As a matter of basic principle, we have determined that the specifications for type approval should be sufficiently rigid that they can be met only by instruments of the latest and most modern design. The specifications set forth in § 73.53, as appended, reflect this principle.

38. Nevertheless, there is at least one type of monitor, used in many stations, of fairly recent design and currently being manufactured, which, while it may not be expected to meet the above mentioned specifications in all respects, would appear to be satisfactory for interim use in providing remote phase indications. We believe that when such a monitor is available, its employment for this purpose for a reasonable period of time should be permitted.

39. We do not believe that a desirable upgrading of station performance is to be achieved, or the public interest otherwise would be served by the indefinite "grandfathering" of monitors, which may be obsolete or inadequate, for those stations not falling into any of the categories above discussed.

40. In a Note appended to § 73.69, paragraph (a) of which requires the use of type approved monitors, we have established a schedule for the effectuation of this requirement. Pursuant to this schedule, new stations and existing stations authorized to make major changes must install type approved monitors immediately; stations employing lesser grade operators must fulfill this requirement by June 1, 1974; remotely controlled stations undertaking to read and log phases at a remote control point must employ such monitors unless a monitor

designed for remote RF switching, and to provide remote phase readings is available—in which case it may be used in lieu of a type approved monitor until June 1, 1975. All stations employing directional antennas will be required to have type approved monitors installed by June 1, 1977.

41. As summarized in paragraphs 17 and 18, exception is taken by several parties to the requirement of proposed Section 73.69(b)(5) that the replacement of a defective monitor by another monitor shall be the occasion for a skeleton proof-of-performance. The purpose of such a requirement, of course, is to establish definitively the indications of the replacement monitor which will obtain when the array is in proper adjustment. A skeleton proof is probably the only procedure, short of a partial or complete proof of performance, which will insure, under all circumstances, that the indications of the replacement phase monitor may be relied upon. For instance, the station may have been without a monitor for a considerable period of time, or the defective monitor may have been giving erroneous indications, and adjustments may have been made of the array on the basis of such readings before the monitor was taken out of service. If the station licensee has had no occasion in the recent past to run a complete or partial proof, it is questionable whether satisfactory field strength indications at the few monitoring points specified in the license will, alone, provide adequate evidence that the radiation pattern remains substantially unchanged from its original configuration. Finally, in a situation where the Commission has heretofore set no standards for the performance of phase monitors, it is perhaps unlikely, even when the array is properly adjusted, that a new monitor will give indications in all cases closely approximating those specified in the license, which were based on indications of the previous monitor.

42. In that portion of its comments filed in companion Docket 18455 concerning the replacement of an existing monitor by a phase monitor type approved for the provision of remote phase indications, Storer urges that a specific procedure be adopted for making such a replacement. We agree that this is desirable. The rules for this purpose may appropriately be included in proposed Section 73.69, which we are presently discussing. We, therefore, have deleted proposed subparagraph (b)(5), which deals only with the replacement of a defective monitor and have added new paragraph (c), which covers the general case of the replacement of one phase monitor by another. We will require a proof of performance only when the station is unable to establish, by the specified base current observations and monitoring point measurements that the directional array is operating within the limits and tolerances required by its license and the rules. Under such circumstances we are requiring a partial rather than a skeleton proof, since the latter ordinarily would not provide information to demonstrate that the array had been brought into proper adjustment.

43. We believe that in adopting this procedure we avoid unnecessary hardship for the station operator, and at the same time, insure that the indications of the replacement monitor represent conditions of proper array adjustment.

44. The specifications which we are adopting for type approved monitors are set forth in a new Section 73.53 of the rules, included,

as are the other rule amendments adopted herein, in Appendix A. These specifications were formulated after full consideration of the comments filed in this proceeding, and of the results of an examination by our Laboratory of representative monitors of modern design.

45. At this point, we would note that while our original Notice, the comments filed and our subsequent discussion of the matters involved have been concerned with the characteristics and use of a *phase* monitor, Section 73.53 and the other amended rules designate this instrument as an *antenna* monitor. This broader term is more truly descriptive of its functions—such a monitor customarily includes facilities for determining the relative amplitudes, as well as the relative phases of RF signals applied to its input terminals. Moreover, in response to the comments urging that this be done, we are specifying the inclusion of the amplitude indicating capability as a condition for type approval. We had initially proposed this capability as an optional feature of the monitor, since other instruments normally employed in the broadcast station provide information on the relative amplitudes of tower currents. However, we are persuaded that the incorporation of this facility in the monitor makes for more convenient, and, in some cases, more accurate determinations of amplitude ratios, particularly if a station is operated by remote control, or where lesser grade operators are placed in charge of the transmitting system, pursuant to recently amended Section 73.93.

46. We have established specifications, both for the absolute accuracy of indication of the monitor, and for its repeatability. Accuracy figures are set for phase and amplitude indications over two ranges of relative amplitudes, as the accuracy of indication of antenna monitors characteristically lessens as the ratio of the amplitudes of the applied signals increases. The decrease in accuracy of phase indications under such conditions is quite small. The loss in accuracy of amplitude indication is more substantial, and stems both from inherent non-linearities of the system, and the reduction in reading accuracy which inevitably increases as lower scale values of the amplitude indicating device are approached. As a practical matter, the decreased accuracy available under such circumstances is quite tolerable, since the phase and amplitude relationships indicated are with respect to a tower with relatively low antenna current, whose phase and amplitude variations have a less significant effect on the directional radiation pattern configuration then would corresponding changes in an element with higher current.

47. We realize that the ability of the monitor to indicate accurately the magnitude of changes occurring in antenna parameters in day-to-day operations is of more importance than an extremely high order of absolute accuracy, and, accordingly, we have included a separate specification for this characteristic of the monitor; we are designating it as the repeatability of indication of the monitor, rather than as its resolution, the term suggested in the comments. In adopting the former term, we conceive it to reflect, not only the limit of the ability of the monitor to provide perceptible indications of changes occurring in the relationships of signals applied to the monitor at any given time, but also its ability to provide the same indications (within the limits of reading accuracy) of any particular phase and

amplitude relationship, when observed at different times. Since Section 73.114(a)(1)(v) of the appended rules requires the antenna monitor be calibrated at weekly intervals, our tests for type approval will determine the repeatability of indication of antenna monitors submitted for type approval, as that attained during a seven day period, without adjustment of the monitor after its initial calibration.

48. The specified values of accuracy and repeatability must be achieved over the range of ambient temperatures and line voltages specified in 73.53, which are considered to include variations of a magnitude encountered under actual conditions of operation.

49. A separate specification has been established for the tolerable variation in phase indication when the applied signals are modulated. The test for this variation is conducted with a sinusoidal modulating signal. This signal, of course, is reproducible, and, we believe, yields a result not appreciably differing from that which would be produced by program modulation within the same amplitude range.

50. Since we have established stated requirements for accuracy and repeatability of indication, we believe it unnecessary, to specify separately a figure for the linearity of the indicating devices, as suggested in the comments.

51. In view of all of the above, IT IS ORDERED, effective February 23, 1973, that Part 73 of the Rules and Regulations IS AMENDED in accordance with the Appendix.

52. Authority for the adoption of these rule amendments is found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

53. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

APPENDIX

§ 1.1120 [Amended]

1. Amend § 1.1120 as indicated below:
Insert new entry in the table entitled TYPE APPROVAL, as follow:
1. * * *
(a) * * *
(1) * * *
(2) * * *
(3) Broadcast antenna monitors 100 400
Renumber present (3) as (4) and retain.
2. A new § 73.53 is added, to read as follows:

§ 73.53 Requirements for type approval of antenna monitors.

(a) General requirements.

(1) Any manufacturer desiring to submit a monitor for type approval shall submit an application to the Commission in accordance with the procedure set forth in § 2.561, and subject to the fee schedule in § 1.1120.

(2) Type approval of a monitor is granted subject to the limitations and requirements described in Part 2, Subparts F and I of this chapter.

(b) The Laboratory Division of the Commission will make all tests necessary to determine whether or not the specifications of paragraph (c) have been met. During these tests, the monitor will be operated, to the extent possible, under service conditions. The manufacturer shall furnish to the Laboratory all instructions and services which will be supplied to a purchaser of the monitor.

(c) An antenna monitor eligible for type approval by the Commission shall meet the following specifications:

(1) The monitor shall be designed to operate on a frequency in the band 540 to 1600 kHz.

(2) The monitor shall be capable of indicating any phase difference between two RF voltages of the same frequency over a range of from zero to 360 degrees.

(3) The monitor shall be capable of indicating the relative amplitudes of two RF voltages.

(4) The device used to indicate phase differences shall indicate in degrees, and shall be graduated in increments of 2 degrees, or less. If a digital indicator is provided, the smallest increment shall be 0.5 degree, or less.

(5) The device used to indicate relative amplitudes shall be graduated in increments which are 1 percent, or less, of the full scale value. If a digital indicator is provided, the smallest increment shall be 0.1 percent, or less, of the full scale value.

(6) The monitor shall be equipped with means, if necessary, to resolve ambiguities in indication.

(7) If the monitor is provided with more than one RF input terminal in addition to a reference input terminal, appropriate switching shall be provided in the monitor so that the signal at each of these RF inputs may be selected separately for comparison with the reference input signal.

(8) Each RF input of the monitor shall provide a termination of such characteristics that, when connected to a sampling line of an impedance specified by the manufacturer, the voltage reflection co-efficient shall be 3 percent or less.

(9) The monitor shall be designed so that the switching function required by (7) may be performed from a point external to the monitor, and phase and amplitude indications be provided by external meters. The indications of external meters furnished by the manufacturer shall meet the specifications for accuracy and repeatability of the monitor itself, and the connection of these meters to the monitor, or of other indicating instruments with electrical characteristics meeting the specifications of the monitor manufacturer shall not affect adversely the performance of the monitor in any respect.

(10) If the monitor is fitted with operational features not specifically required by this section, the features:

(i) Shall be arranged so as not to interfere with or be confused with the required functions of the monitor.

(ii) Shall meet the manufacturer's specifications for such operational features.

(11) The monitor shall be accompanied by complete and correct schematic diagrams and operating instructions. For the purpose of type approval, these diagrams and instructions shall be considered as part of the monitor.

(12) The general design, construction and operation of the monitor shall be in accordance with good engineering practice.

(13) When an RF signal of an amplitude within a range specified by the manufacturer is applied to the reference RF input terminal of the monitor, and another RF signal of the same frequency and of equal or lower amplitude is applied to any other selected RF input terminal, indications shall be provided meeting the following specifications.

(i) The accuracy with which any difference in the phases of the applied signals is indicated shall be ±1 degree, or better, for signal amplitude ratios of from 2/1 to 1/1, and ±2 degrees, or better, for signal amplitude ratios in excess of 2/1 and up to 5/1.

(ii) The repeatability of indication of any difference in the phases of the applied signals shall be ±1 degree, or better.

(iii) The accuracy with which the relative amplitudes of the applied signals is indicated, over a range in which the ratio of these amplitudes is between 2/1 and 1/1, shall be ±2 percent of the amplitude ratio, or better, and for amplitude ratios in excess of 2/1 and up to 5/1, ±5 percent of the ratio, or better.

(iv) The repeatability of indication of the relative amplitudes of the applied signals, over a range where the ratio of these amplitudes is between 5/1 and 1/1, shall be ±2 percent of the amplitude ratio, or better.

(v) The modulation of the RF signals by a sinusoidal wave of any frequency between 100 and 10,000 Hz, at any amplitude up to 90 percent shall cause no deviation in an indicated phase difference from its value, as determined without modulation, greater than ±0.5 degree.

(14) The performance specifications set forth in (13) above, shall be met when the monitor is operated and tested under the following conditions.

(i) After continuous operation for one hour, the monitor shall be calibrated and adjusted in accordance with the manufacturer's instructions.

(ii) The monitor shall be subjected to variations in ambient temperature between the limits of 10 and 40 degrees Centigrade; external meters furnished by the manufacturer will be subjected to variations between 15 and 30 degrees Centigrade.

(iii) Power line supply voltage shall be varied over a range of from 10 percent below to 10 percent above the rated supply voltage.

(iv) The amplitude of the reference signal shall be varied over the operating range specified by the manufacturer, and in any case over a range of maximum to minimum values of 3 to 1.

(v) The amplitude of the comparison signal shall be varied from a value which is 0.2 of the amplitude of the reference signal to a value which is equal in amplitude to the reference signal.

(vi) Accuracy shall be determined for the most adverse combination of conditions set forth above.

(vii) Repeatability shall be determined as that which may be achieved under the specified test conditions over a period of seven days, during which no calibration or adjustment of the instrument, subsequent to the initial calibration, shall be made.

(viii) The effects of modulation of the RF signal shall be separately determined, and shall not be included in establishing values for accuracy and repeatability.

3. A new § 73.69 is added, to read as follows:

§ 73.69 Antenna (phase) monitors.

(a) Each station utilizing a directional antenna shall have in operation at the transmitter an antenna monitor which is of a type approved by the Commission, provided, however, that if the instrument of authorization of the station sets specific tolerances within which phase and amplitude relationships must be maintained, or requires the use of a monitor of specified repeatability or accuracy, the antenna monitor employed under such circumstances shall be authorized on an individual basis.

(b) In the event an antenna monitor becomes defective, the station may be operated without the monitor pending its repair or replacement for a period not in excess of 60 days without further authority from the Commission; *Provided, That:*

(1) Appropriate entries shall be made in the maintenance log of the station showing the date and time the monitor was removed and restored to service.

(2) If the license specifies antenna monitor sample current ratios, during the period the antenna monitor is out of service, base currents or remote base currents shall be read and logged at least once each day.

(3) Field strength measurements at each monitoring point specified in the stations authorization shall be read and logged at least once every seven days.

(4) If the station is operated by remote control and phase indications are read and logged at the remote control point, during the period the antenna monitor is out of service indicating instruments at the transmitter shall be read and logged at the times specified in § 73.114(a)(8)(ii) for remotely controlled stations which do not provide for the reading and logging of phases at the remote control point.

(c) If an authorized antenna monitor is replaced by another antenna monitor, the following procedure shall be followed:

(1) Temporary authority shall be requested and obtained from the Commission in Washington to operate with parameters at variance with licensed values, pending issuance of a modified license specifying new parameters.

(2) Immediately prior to the replacement of the antenna monitor, after a verification that all monitoring point values and base current ratios are within the limits or tolerances specified in the instrument of authorization or the pertinent rules, the following indications shall be read and recorded in the maintenance log for each radiation pattern: final plate current and plate voltage, common point current, base currents, antenna monitor phase and current indications, and the field strength at each monitoring point.

(3) With the new monitor substituted for the old, all indications specified in (2), above, again shall be read and recorded. If no change has occurred in the indication for any parameter other than the indications of the antenna monitor the new antenna monitor indications shall be deemed to be those reflecting correct array adjustment.

(4) If it cannot be established by the observations required in (2), above, that base current ratios and monitoring point values are within the tolerances or limits prescribed by the rules and the instrument of authorization, or if the substitution of the new antenna monitor for the old results in changes in these parameters, a partial proof of performance shall be executed, consisting of at least 10 field strength measurements, on each of the radials established in the latest complete adjustment of the antenna system. These measurements shall be made at locations, all within 2 to 10 miles from the antenna, which were utilized in such adjustment, including, on each radial, the location, if any, designated as a monitoring point in the station authorization. Measurements shall be analyzed in the manner prescribed in Section 73.186 of this part.

(5) An informal request for modification of license shall be submitted to the Commission in Washington, D.C., within 30 days of the date of monitor replacement. Such request shall specify the make, type, and serial number of the replacement monitor, phase and sample current indications, and other data obtained pursuant to subparagraph (c).

NOTE: § 73.69(a) shall become effective, as follows:

(1) Each new station and each existing station for which major changes (see § 1.571(a)(1)) are authorized after June 1, 1973, shall be equipped with a type approved antenna monitor.

(2) Each station electing to utilize licensed operators other than first class radiotelephone operators for routine transmitter duty (see § 73.93) shall meet this requirement by June 1, 1974.

(3) Each station operating by remote control, when adopting the schedule specified in § 73.114(a)(9)(iii) for observations at the transmitter, shall install a type approved antenna monitor and provide phase indications at the remote control point, for observation and logging pursuant to § 73.113(a)(4)(ii), provided that, in lieu of a type approved monitor, the station may, until June 1, 1975, employ any monitor, manufactured after January 1, 1965, which is designed to afford phase indications on a device located externally to the monitor, and which incorporates any necessary facilities whereby alternative RF inputs to the monitor may be selected by external switching.

(4) All other stations shall meet the requirements of this rule by June 1, 1977.

F.C.C. 73R-3

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
ROBERT COWAN WAGNER, PINEVILLE, LA.	Docket No. 19473
	File No. BP-18465
SOUTHEAST ARKANSAS RADIO, INC., DERMOTT, ARK.	Docket No. 19474
	File No. BP-18476
For Construction Permits	

MEMORANDUM OPINION AND ORDER
(Adopted January 3, 1973; Released January 5, 1973)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT.

1. By Memorandum Opinion and Order, FCC 72-235, released March 24, 1972, the Commission designated the above-captioned applications for hearing on several issues.[1] Presently before the Review Board is a petition to enlarge issues, filed April 14, 1972, by Southeast Arkansas Broadcasters, Inc. (KVSA), licensee of standard broadcast Station KVSA, McGehee, Arkansas.[2] KVSA requests the addition of financial, staffing, Rule 1.65, concealment, 307(b) programming and "public file" issues against Southeast Arkansas Radio, Inc. (Southeast).[3]

FINANCIAL ISSUES

2. KVSA requests the addition of two issues essentially inquiring into: (a) Southeast's estimate of first year expenses; (b) its ability to meet second year expenses; (c) its equipment cost estimates; and (d) whether 100 shares of corporate stock have, in fact, been issued or merely subscribed. KVSA initially criticizes Southeast's estimate of first year expenses of $65,000, arguing that there is no showing to support this estimate and that, since the application indicates a full time staff of eight persons for a 10 kw directional station requiring a first-class engineer at all times, the estimate appears to be unrealistically low. KVSA next argues that Southeast is attempting to evade

[1] A third application, that of Patrick H. Robinson, which was also designated for hearing, has since been dismissed by the Administrative Law Judge by Order, FCC 72M-682, released May 24, 1972.

[2] By Order of the Administrative Law Judge, FCC 72M-568, released May 1, 1972, KVSA's petition to intervene was granted and KVSA was made a party to this proceeding.

[3] Also before the Review Board are the following related pleadings: (a) opposition, filed May 18, 1972, by Southeast; (b) Broadcast Bureau's comments, filed May 18, 1972; (c) reply, filed May 31, 1972 by KVSA; (d) [further] reply, filed September 26, 1972, by KVSA; and (e) motion to strike (d), filed September 29, 1972, by Southeast. The Review Board will accept the late-filed KVSA reply of May 31, 1972, because the tardiness is minor, the reply is unopposed, and relevant and important information is contained therein. The Board will, however, grant the motion to strike KVSA's second reply pleading, filed September 26, 1972. Commission Rule 1.45(b) requires replies to be filed within five days after the filing of any oppositions. KVSA's second reply is almost four months late and good cause for its filing has not been shown. Moreover, the information upon which the pleading is based was available at the time of the filing of the first KVSA reply. KVSA's second reply will, therefore, be dismissed.

Ultravision[4] requirements by postponing liability on its bank loan to the second year and beyond because, by the terms of that loan, payments begin during the second year of operation of the station and the amount then due is over $30,000. KVSA contends that such an amount, added to normal operating expenses, will far exceed estimated revenues and that, due to a high debt to asset ratio, Southeast will not be able to meet its financial obligations. Petitioner next attacks Southeast's estimate for cost of equipment, contending that the estimate of $60,300 is over three years old and does not reflect current market costs. Finally, petitioner argues that Southeast's application is "internally contradictory" in that it shows 100 shares of no par stock have been issued, whereas the corporation balance sheet lists these shares as subscribed, rather than issued.

3. In opposition, Southeast first explains that, while the stock in question was in fact subscribed and "considered" as issued, actual physical distribution was considered an unnecessary formality until the corporation became more than an applicant. Southeast notes that in order to eliminate any doubt, formal issuance has now occurred. In reference to the estimate for equipment costs, Southeast supplies a current estimate of $71,337 from its equipment supplier and a new credit letter. In regard to its estimate for first year operating expenses of $65,000, Southeast points to KVSA's operating expenses of $65,028 for 1971 and argues that over $16,000 of this amount was paid to KVSA stockholders, indicating that a similar station in the same geographic area[5] is operated for less than $50,000 a year. In this connection, Southeast declares that, contrary to KVSA's allegations, it will have a staff of only five full time and three part time employees and that the proposed station manager has agreed to serve without compensation if necessary. Southeast next supplies a proposed itemized operating budget which totals over $56,000, leaving a contingency fund of nearly $9,000.[6] Southeast relies on this budget to prove that its $65,000 estimate is accurate. In reference to petitioner's claim that it will not have sufficient funds for the second year of operation, Southeast points to its proposed budget which includes $9,000 interest for the bank loan payment and a $1,400 interest payment to the equipment supplier, and also argues that "it is folly to assume that the station would operate for an entire year and be unable to take in any revenues." Finally, Southeast notes that it filed a petition to amend its application to provide for a new bank loan of $150,000, which is $30,000 more than the old loan.[7] Southeast therefore contends that it has an excess of $36,000 over its actual requirements and that there is no basis for an inquiry into its financial qualifications.

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[4] In *Ultravision Broadcasting Co.*, 1 FCC 2d 544, 5 RR 2d 343 (1965), the Commission stated that it would thereafter require applicants for commercial broadcast stations to make a showing that they can construct their station and operate for a period of one year thereafter without reliance on revenues.

[5] Station KVSA is licensed to McGehee, Arkansas, which is located seven miles from Dermott, Southeast's proposed city of license.

[6] Southeast's proposed budget of $65,000 includes: $35,750 for salaries; $4,062 for administrative costs; $1,600 for leases on a transmitter and studio site; $3,900 for news services, and finance charges of $9,000 to the bank and $1,400 to the equipment supplier—with a contingency fund of $8,900.

[7] The amendment was accepted by the Administrative Law Judge by Memorandum Opinion and Order, FCC 72M-731, released June 5, 1972. The amendment was further clarified by a later amendment, accepted by the Presiding Judge by Order, FCC 72M-950, released July 25, 1972.

4. The Broadcast Bureau supports petitioner's request for an inquiry into Southeast's ability to finance the second year of operation. However, the Bureau opposes an inquiry into the other matters raised by petitioner, believing that, as to the estimate of first year expenses and the equipment proposal, KVSA has failed to supply adequate specific factual allegations, and that the "contradiction" concerning the corporate stock arose from a minor "misnomer" in Southeast's balance sheet. KVSA's reply argues, *inter alia*, that because Southeast's staffing proposal is inadequate, the salaries are underestimated, and that the $16,000 payment to its stockholders represents salary paid to staff, rather than dividends.

5. The Review Board will not order an inquiry into the adequacy of Southeast's estimate for first year expenses, its estimate for equipment costs, or the circumstances surrounding the subscription and issuance of shares of stock. As to the first year operating expenses, Southeast has supplied an itemized budget of $65,000, with remaining first year cash requirements of $85,837 for equipment. Thus, Southeast's total first year cash requirements are estimated at $148,837. To meet this requirement, Southeast has shown that it has available a $150,000 bank loan and $35,668 in deferred credit from the equipment supplier; therefore, it appears to have available over $36,000 in excess of estimated cash requirements. Under these circumstances, the Board perceives no reason to question Southeast's first year financial proposal. Moreover, the Board is satisfied that the new estimate of the equipment supplier provides a reasonable and current estimate of that expense and that the confusion over whether the stock had in fact been issued was the result of an inadvertent and relatively insignificant error that has now been corrected by formal issuance. However, the Board believes that it must add a limited issue to inquire into Southeast's proposed second year financing. It is to be initially noted that the proposed bank loan of $150,000 provides for a moratorium on principal payments during the first year and a total term of six years ($25,000 per year). Also, by the terms of the credit arrangement with the equipment supplier, the $35,668 will be due in monthly payments during the second and third year of operation ($17,834 per year). These deferred payments will total $42,834 for the second year, exclusive of interest. By its own estimate, Southeast will also need approximately $65,000 for operating expenses, for a total second year cash requirement of $107,834. Southeast claims that this amount will be covered by revenues from the first and second year, although absolutely no substantiation of this claim is provided. Moreover, Southeast has set up an extremely thin corporate structure with a very high debt to asset ratio. Indeed, rather than supply risk capital, Southeast is relying solely on loans and deferred credit arrangements to finance its operation. In our view, these circumstances raise a serious question as to whether Southeast will be able to sustain itself during the second year of operation.[8]

[8] See *Greenfield Broadcasting Corp.*, 32 FCC 2d 135 (1971); *A–C Broadcasters*, 10 FCC 2d 256, 11 RR 2d 359 (1967); *Clay Broadcasters, Inc.*, 21 RR 2d 442 (1971); *5 KW, Inc.*, 33 FCC 2d 895, 23 RR 2d 1015 (1972).

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ISSUES RELATING TO SOUTHEAST'S STAFFING PROPOSAL AND BUSINESS INTERESTS

6. KVSA also requests the addition of issues to determine whether Southeast has changed its staffing proposal [9] and the current status of the business interests of Bennie Ryburn, Sr. and Bennie Ryburn, Jr., principals in the Southeast application. In support of the requested issue as to staffing, KVSA attaches to its petition a copy of a newspaper article from the Dermott *News*, dated October 13, 1971, in which Billy Calhoun, a vice president of Southeast and proposed station manager, is quoted as stating that the proposed station "would employ 10 to 12 people, and possibly 15." KVSA argues that this statement indicates a change in Southeast's staffing proposal and should have been promptly reported. KVSA thus concludes that an issue is needed to determine "the amount of staff required" and a related Rule 1.65 issue. In reference to the business interests of the Ryburns, KVSA attaches a portion of an article from the Dumas *Clarion*, Dumas, Arkansas, dated January 12, 1972, which states that the above named Southeast principals purchased the majority of the stock of the Citizens Bank, Tillar, Arkansas. KVSA submits that this fact has not been reported to the Commission. KVSA alleges that the stock purchase is potentially more damaging to the Southeast application than a Rule 1.65 violation because, according to KVSA, Arkansas law prohibits a stockholder in three or more banks from borrowing from such banks.[10] KVSA states that "while [it] has no hard evidence that there are other undisclosed bank interests", Mr. Kinney, a KVSA principal, has "hearsay evidence" that Mr. Ryburn, Sr. has an interest in the "Farmers Bank of Hamburg," and others may have an interest in the "First State Savings and Loan Association of Monticello". If such were the case, argues petitioner, Southeast's proposed $120,000 loan would be "illegal" and its financial proposal would obviously be inadequate.

7. In opposition, Southeast attaches an affidavit from Billy Calhoun, in which he avers that he was misquoted in the newspaper article, and, in fact, stated only that the station *could* employ 10 to 12 or even 15 people, but that this would be sometime in the future and contingent on "the possibility that Southeast might someday get authority for nighttime broadcasts." With regard to the business interests of its principals, Southeast acknowledges that the Ryburns have acquired the majority stock in the Citizens Bank in Tillar, that between January, 1971, and April, 1972, Ryburn, Sr. held "a minority position in the Farmers Bank in Hamburg," and that he also had a "small interest in the First State Savings and Loan Association." It is alleged by Southeast that Mr. Ryburn did not report these interests to Southeast's attorneys because "he could not conceive of any way this acquisition[s] would affect the radio application" and that he did not attempt to conceal these acquisitions in any manner. Finally, South-

[9] Southeast's application proposes a staff of eight people.

[10] According to petitioner, Section 67–509 of the Arkansas Statutes reads as follows: "Any person or persons, and/or any company, co-partnership, corporation or other legal entity in which such person or persons own or control a substantial interest, owning either singly or jointly an aggregate of fifty percent (50%) or more of the capital stock of three (3) or more banks and/or trust companies, thus forming a chain or group of banks and/or trust companies, shall be, and are hereby prohibited from borrowing from, or becoming indebted to, such banks, and/or trust companies, thus owned and controlled in any amount or in any manner."

east contends that the Arkansas law referred to by KVSA does not apply to its loan because the stockholders of Southeast do not and have never owned a controlling interest in three or more banks as defined by the Statute; however, to avoid any doubt, Southeast states that it has obtained a new loan commitment of $150,000 from a different bank. (See note 7, *supra.*) Southeast concludes by noting that the Commission was informed by the original application that Mr. Ryburn was in the banking business and that the subsequent control of a second bank and a minority interest in a third bank has no effect on Southeast's qualifications and addition of the requested issues is therefore not warranted.

8. The Broadcast Bureau opposes addition of the issues relating to Southeast's staffing proposal, arguing that, without a supporting affidavit, the newspaper article is insufficient under Section 1.229(c) of the Rules. As to the business interests of Southeast's principals, the Bureau supports the addition of a limited comparative issue only, arguing that the acquisitions "would have no effect on [Southeast's] qualifications" and, therefore, failure to report should not disqualify Southeast. In reply, KVSA argues that Southeast's failure to report Mr. Ryburn's interest requires addition of a Rule 1.65 issue. Petitioner also attacks the new loan commitment for failure to provide the terms of the loan as well as the necessary guarantees.

9. The Review Board will deny the requested issues relating to Southeast's staffing proposal principals' business interests. With regard to the staffing proposal, it is to be initially noted that there is no supporting affidavit of an individual with personal knowledge thereof, as required by Rule 1.229. In addition, Mr. Calhoun's averment, that his statement that the station "could" (rather than "would") employ 10 to 12 persons, is credible when viewed within the context of the article itself, which states that the comment was made during a question and answer period and the clause in the article immediately following the statement in question discusses the applicant's plans to apply for nighttime authorization sometime in the future. Accordingly, the Board does not believe that the allegations in this regard require either a staffing issue or a related Rule 1.65 issue. In reference to the business interests of the Ryburns, Southeast has admitted that it failed to inform the Commission that Mr. Ryburn has "gained control of a second bank and a minority position in a third bank." Such interests represent a significant change in the information contained in its application and could affect Southeast's financial qualifications because the Ryburns' financial status and stability appear to provide the central basis for the proposed bank loan commitments. Therefore, these bank interests should have been reported and the failure to do so requires addition of the requested Rule 1.65 issue. However, the failure to inform does not appear to be intentional and Southeast has come forward with a complete statement of the Ryburns' banking interests. Moreover, the Arkansas Statute is clearly no longer applicable due to the new bank loan commitment,[11] and the violation is, at most, of questionable significance. Thus, the Board does not believe that this matter should reflect on the applicant's basic qualifications.

[11] The terms thereof are more fully stated in a second letter from the Bank dated June 7, 1972, and accepted by the Administrative Law Judge by Order, FCC 72M–950, *supra.*

PUBLIC FILE ISSUE

10. In support of its request for a "public file" issue, petitioner supplies the sworn statement of Mr. Alan W. Eastham of Dumas, Arkansas, who, KVSA states, was acting as "agent" for Abbott F. Kinney, president of KVSA. In his affidavit, Eastham avers that on April 4, 1972, he proceeded to inspect Southeast's public file and went to the location specified in the legal notice published in the Dermott *News*,[12] but the file was not there. According to KVSA, a service station is located at that address and is operated by a Mr. Alvin Torrence, who, Mr. Eastham says, told him that he (Mr. Torrence) "knew what Mr. Eastham was looking for" but that it had been moved and was now in the possession of Mr. Billy Calhoun, Southeast's proposed station manager. Mr. Eastham then states that Mr. Torrence tried to locate Mr. Calhoun but was unsuccessful. On April 5, 1972, the required notice of the Commission hearing date was published, as well as a new location of the local public file, and petitioner states that on April 6, 1972, Mr. Eastham telephoned that new location three times but received no answer.[13] In petitioner's opinion, these facts "indicate that there is a substantial question concerning whether there has been a violation of Section 1.594 of the Rules."

11. In opposition, Southeast submits the affidavit of Mr. Calhoun, in which he avers that the file was at the location specified in the March, 1969, public notice until January, 1970. At that time, Mr. Calhoun states, he moved the file to an office in his home—approximately six blocks away—because he has subleased the service station. Moreover, avers Calhoun, the operator of the station knew him and was willing to refer any inquiries concerning the file. Mr. Calhoun further states that Dermott is a "small town" and "we do business in a small town way." According to Calhoun, his office was never locked while the file was there and the file was openly in view and plainly marked. Finally, Mr. Calhoun states that, in spite of the fact that the file has always been available, he has now made arrangements to move the file to the City Clerk's office where it will be available to anyone who requests it.[14] The Broadcast Bureau also opposes the requested issue, contending that petitioner's allegations are too indefinite to add the issue; however, the Bureau maintains, the full circumstances should "be examined in light of Southeast's comparative qualifications."

12. The Review Board will add the requested public file issue. It is not disputed that, on two separate occasions, Eastham attempted to inspect Southeast's public file at the addresses stated in the required public notice and was unsuccessful each time. While Southeast attempts to explain Eastham's difficulties, it does not deny or contradict the basic fact that the file was not available to the public at either location. In this regard, we note that it is the applicant's responsibility to see to it that a copy of its application is always available for public inspection during normal business hours. The responsibility is the

[12] Sections 1.580 and 1.594 of the Rules require, *inter alia*, that an applicant publish a local notice indicating, respectively, that an application is on file with the Commission and that the Commission has established a hearing date. These sections also require that the notice state the location of the local file. Accordingly, in March, 1969, Southeast published notice of its application, and on April 5, 1972, notice of the hearing was published.

[13] The new location is the residence and informal office of Mr. Calhoun.

[14] By an amendment filed July 14, 1972, Southeast indicates that its file is now located in the offices of the City Clerk of Dermott and that the new location has been published in the local weekly newspaper.

applicant's, and not, as Southeast suggests, the inspector's. The rule applied to *all* applicants, whether or not they do business in a "small town" way, as Southeast says it does. Moreover, in this case, it appears that, for a period of over two years (*i.e.*, from January, 1970, to April, 1972), the public file was not available at the location stated in the local public notice. In view of the foregoing, the requested issue must be added. See *Louis Vander Plate*, 15 FCC 2d 285, 14 RR 2d 760 (1968).

307(B) PROGRAMMING ISSUE

13. Finally, petitioner requests an issue to permit introduction of evidence on the program service presently provided by Station KVSA to Dermott. Petitioner explains that under the technical considerations of the 307(b) issue, Southeast would presumably receive a preference for providing a first local transmission facility; however, argues petitioner, the particular circumstances of this proceeding should negate such a presumption. In support, KVSA notes that McGehee, Arkansas, its city of license, is only seven miles from Dermott and that KVSA's studios and transmitter are located midway between the two towns. Moreover, KVSA submits, it maintains dual local studio logs, telephone listings, and bank accounts, and is a member of numerous civic organizations in both towns and covers in detail all such meetings. KVSA also points to a resolution adopted by the Dermott City Council on October 11, 1971, praising KVSA's active participation in local community affairs. KVSA next refers to the ascertainment of community needs showing in its last renewal application, dated February 28, 1970, which shows that nearly one-third of the community leaders surveyed resided in Dermott and that a thorough investigation of the problems and needs of Dermott was made at that time. In addition, notes KVSA, much of its local affairs programming meets these needs as well as a number of the joint needs of both communities, such as merging of the school districts and area industrial development. Finally, in its effort to show that Dermott's needs are being met by existing programming, petitioner alleges that Abbott F. Kinney, president and general manager of KVSA, is a native of Dermott, presently resides there, and is totally familiar with and active in that community's needs and interests. The Broadcast Bureau supports KVSA's request. In opposition, Southeast insists that KVSA's programming proposal is far too limited to allow adequate coverage of the special needs and interests of Dermott, and that, although KVSA did survey Dermott community leaders, it has listed no programs to meet the ascertained needs, with the exception of the joint school program.

15. The Review Board believes that the petitioner's allegations are sufficient to constitute a threshold showing that Station KVSA's existing programming may be, at least to some extent, meeting the programming needs of Dermott at the present time and may therefore be of potential decisional significance. *Cookeville Broadcasting Co.*, 19 RR 897 (1960); *Boardman Broadcasting Co.*, 1 RR 2d 931 (1964); *Charlottesville Broadcasting Corp.*, 1 FCC 2d 1323, 6 RR 2d 744 (1965). Southeast's claim that KVSA's programming is too limited to adequately meet Dermott's unique needs is contradicted by KVSA's strong showing that it is both aware of and presently programming for such needs. Nearly one-third of its most recent ascertainment sur-

vey was conducted in Dermott and specific programs are listed which attempt to satisfy the ascertained needs and interests. Thus, as noted by petitioner, the effect of a determination that Dermott's programming needs were being met by Station KVSA would be to potentially negate Southeast's possible preference as a first local transmission facility and, in turn, affect the ultimate determination of which community (Pineville or Dermott) has the greater need for a broadcast facility. "However, in accordance with our usual practice, the requested issue will be added on a contingent basis and is authorized only in the event that the [Southeast] proposal otherwise would prevail under standard Section 307(b) criteria." *Pettit Broadcasting Co.*, 30 FCC 2d 930, 934, 22 RR 2d 543, 548 (1971). See also *Radio Collinsville, Inc.*, 14 FCC 2d 1058, 14 RR 2d 559 (1968).

16. Accordingly, IT IS ORDERED, That, the motion to strike, filed September 29, 1972, by Southeast Arkansas Radio, Inc., IS GRANTED, and the reply to opposition to KVSA petition to enlarge issues, filed September 26, 1972, by Southeast Arkansas Broadcasters, Inc. IS DISMISSED; and

17. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed April 14, 1972, by Southeast Arkansas Broadcasters, Inc. IS GRANTED to the extent indicated below, and IS DENIED in all other respects; and

18. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following issues:

1. To determine whether Southeast Arkansas Radio, Inc. will have available sufficient funds to sustain its proposed station during the second year of operation and, in light of the evidence adduced pursuant thereto, whether the applicant is financially qualified; and

2. To determine whether Southeast Arkansas Radio, Inc. has failed to comply with Commission Rule 1.65, and if so, the effect thereof upon the applicant's comparative qualifications to be a Commission licensee; and

3. To determine whether Southeast Arkansas Radio, Inc. has complied with Section 1.594 of the Commission's Rules, and if not, the effect thereof upon the applicant's basic or comparative qualifications to be a Commission licensee; and

4. In the event that Southeast Arkansas Radio, Inc. should be deemed superior under the ordinary criteria of the Section 307(b) issue in the proceeding, to determine the extent to which programming of existing stations meet the local needs and interest of Dermott, Arkansas, and to determine in light of such evidence which of the applicants should be preferred under the 307(b) issue.

19. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under issue 1 SHALL BE upon Southeast Arkansas Radio, Inc.; that the burden of proceeding with the introduction of evidence under the issues 2, 3 and 4 SHALL BE upon Southeast Arkansas Broadcasters Inc. (KVSA); and that the burden of proof under the issues, 1, 2, 3 and 4 SHALL BE UPON Southeast Arkansas Radio, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1115

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint Concerning
WESTERN BROADCASTING CO., RADIO STATION KKEY, PORTLAND, OREG.
Failure to observe requirements of section 73.1206 of Commission rules

DECEMBER 6, 1972.

RALPH WEAGANT,
Tr/as Western Broadcasting Co.,
Radio Station KKEY,
Post Office Box 3361,
Portland, Oreg. 92708

DEAR MR. WEAGANT: The Commission has received several complaints regarding failure to give complaints proper notice that their conversations were being broadcast simultaneously with the initiation of telephone calls to them by Mr. Jack Hurd, one of your talk show announcers. The Commission monitored the broadcasts of Mr. Hurd on KKEY on August 17, 1972 from 11:03 a.m. to 12:34 p.m. and on August 18, 1971 from 11:00 a.m. to 12:33 p.m.

Although two complaints alleged that no notice whatsoever was given that the conversation was being broadcast simultaneously, it appears that Mr. Hurd's usual on-the-air procedure is to dial the number called and to ask the name of the answering party. He then announces:

> Hello, this is Jack Hurd, KKEY on-the-air
> or
> This is Jack Hurd. We're on-the-air
> or
> This is Jack Hurd, KKEY, we are live and on-the-air.

Mr. Hurd then conducts a conversation with the person called, usually on a subject discussed by a previous called on the show. Thus, at the instant the person called, or any intervening person such as a secretary, answers the telephone, the conversation is commenced and is simultaneously broadcast. Section 73.1206 of the Commission's Rules states as follows:

> **Before recording a telephone conversation for broadcast, or broadcasting such a conversation simultaneously with its occurrence, a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation.**

Thus, a notice of intention to broadcast is required *before* the telephone call is broadcast. The obvious object of the Rule is to give the party called a real opportunity to refuse to have his conversation broadcast while not yet on the air. Under the method used by Mr. Hurd, the person called has no choice but to refuse to conduct the broadcast conversation any further.

In the Commission's recent Public Notice of May 18, 1972, 35 FCC 2d 940, 24 RR 2d 1814, the requirements of Section 73.1206 were made clear when we said:

> **We remind all licensees that Section 73.1206 of our Rules requires that before a telephone conversation is recorded for later broadcast or is begun for simultaneous broadcast, the licensee must inform the other party that the conversation will be recorded for broadcast purposes or will be broadcast live, as the case may be. The recording of such conversation with the intention of informing the other party later—whether during the conversation or after it is completed but before it is broadcast—does not comply with the Rule if the conversation is recorded for possible broadcast. Likewise, the initiation of a live broadcast of a conversation with the intention of seeking the other party's permission for its broadcast sometime during the conversation, does not constitute compliance.**

Not only does the KKEY practice on the Jack Hurd program not comply with Section 73.1206 of the Rules since the voice of the party called is broadcast before the announcement is made, it also appears that the language used by Jack Hurd is not adequate in that it does not clearly inform the person called that he is being broadcast. For example, "Jack Hurd on-the-air" could denote the name of Mr. Hurd's program or show.

We are not instituting forfeiture proceedings in this case because we believe that under the circumstances a letter informing you of your misinerpretation of the requirements of Section 73.1206 of the Rules is more appropriate. The correspondence regarding this matter will be placed in the files of Station KKEY where it will be available for future reference.

Commissioners Burch, Chairman; and H. Rex Lee absent.

By Direction of the Commission,
Ben F. Waple, *Secretary*

F.C.C. 73-26

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WESTERN UNION TELEGRAPH CO. For Authority To Construct Three Synchronous Communications Sattelites To Provide Domestic Satellite Communications Service	Files Nos. 1-DSS-P-71 2-DSS-P-71 3-DSS-P-71

ORDER AND AUTHORIZATION

(Adopted January 4, 1973; Released January 18, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND REID CONCURRING IN THE RESULT.

1. The Commission has before it the above captioned applications which were filed by The Western Union Telegraph Co., pursuant to the *Report and Order* in Docket No. 16495 (22 FCC 2d 86) on July 30, 1970, and appeared on public notice on September 3, 1970 (FCC 70-953). As subsequently amended, these applications propose the construction of three synchronous satellites [1] that would be used in connection with seven earth stations [2] to provide domestic satellite communications services to all 50 states.

2. The Westen Union proposal would employ the HS-333A satellite, which is very similar to the satellites of the Telsat of Canada system, with twelve transponders each with a capacity of 600 two way voice channels, 50 Mb/s of data, or one video channel. The satellite, which would be built by Hughes Aircraft Co. for a service life of seven years, would oe launched with a Thor-Delta vehicle and provide coverage to the 48 contiguous states with a single beam antenna, with the potentiality of serving Alaska and/or Hawaii by spot beams. Western Union requests orbital locations of 90 degrees, 99 degrees and 119 degrees but indicates that all available locations between 90 degrees and 131 degrees would meet its objectives providing that each Western Union satellite is separated by at least 7 degrees. Each satellite is estimated to cost approximately $8.3 million, and the entire system (including launch costs, seven earth stations, and terrestrial interconnection facilities) some $70 million.

3. Western Union estimates that it would achieve a 4800 circuit fill [3]

[1] Initially only two satellites would be launched, the third being used as a ground spare. However, Western Union requests that three orbital locations be assigned so that it may proceed with planning looking toward the expansion of the system. See *FCC Public Notice re Processing Procedures*, released on November 9, 1972 (FCC 72-992); *Memorandum Opinion and Order* released on December 22, 1972 in Docket No. 16495, paragraphs 75-76 (FCC 72-1198).

[2] The earth stations would be located near New York City, Los Angeles, Atlanta, Portland (Ore.), Dallas, Chicago, and Honolulu, at which points they would interconnect with Western Union's terrestrial facilities or those of another carrier.

[3] Based on a capacity of 1200 one-way voice channels per transponder, the capacity of 10 transponders is 6000 2-way circuits. Thus, 4800 voice circuits represent an 80% fill factor. 1200 additional voice circuits could be accommodated in the 10 transponders. This still leaves two transponders of the satellite available to compensate for degradation throughout the satellite lifetime, plus the second satellite in orbit which can be used for back-up, for experimental use or for the provision of preemptible transmission services.

during the fifth year of operation. By 1980 it forecasts that some 8400 circuits would be suitable for satellite transmission. This traffic would be generated primarily from existing Western Union services, e.g., message, Telex, private line, etc. Also, Western Union believes that the system will be used for existing or new wide band services (such as transmission of television signals) and "other services where communications will benefit from the cost insensitivity to distance and other special characteristics of satellite transmission." It etimates that the forecasted traffic would earn, at competitive rates, revenue over the seven year period exceeding its total revenue requirements for the system. Western Union states that it intends to keep separate accounts of satellite costs and revenues, and that in the unlikely event that the satellite operation proves unprofitable, the loss will not be used to justify any rate increase for other essential services.

4. In the *Second Report and Order* in Docket No. 16495, released June 16, 1972 (35 FCC 2d 844), and as modified by the *Memorandum Opinion and Order* released December 22, 1972 (FCC 72–1198), we established our policy with respect to domestic communications satellites. Essentially, it appears that Western Union's satellite proposal is generally consistent with most of these policies. We do not here resolve the question of whether Western Union's entire systef proposal is consistent with all aspects of our policy requirements (e.g., interconnection—see paragraphs 79–84 of the December 22, 1972 *Memorandum Opinion and Order* in Docket No. 16495 (FCC 72–1198)).[4] While the earth station applications are not yet ready for action, Western Union urges early authorization for the satellites which require longer lead times for construction. Aside from the unresolved question of whether Western Union will be allowed to serve Alaska and Hawaii [5] and the question of interconnection with facilities proposed by other domestic satellite applications, there appears to be no substantive reason why this cannot be done. To serve those two States the proposed satellite design incorporates additional feeds for spot beams. However, since such a design feature is relatively insignificant in cost, the satellites could be constructed with this capability even though Western Union may not subsequently be authorized to provide such service. With regard to Western Union's request that orbital positions be assigned at this time, it will be denied. First, there is nothing to be gained by assigning positions far in advance of launch, and secondly, the orbital positions assigned are dependent upon whether Western Union will later be authorized to serve Alaska and Hawaii. Accordingly, such positions will be assigned at a later date. See *Public Notice re Processing Procedures* (FCC 72–992); Memorandum Opinion and Order in Docket No. 16495, released December 22, 1972, paragraph 76, (FCC 72–1198).

5. We find that Western Union is legally, technically, financially and otherwise qualified to undertake the construction and operation of the

[4] These questions will be determined in connection with our consideration of other aspects of Western Union's system applications, and will be resolved, in any event, prior to any grant of operational authority to Western Union.

[5] See *Memorandum Opinion and Order* in Docket 16495, *supra*, at paragraph 78; *Public Notice re Processing Procedures* (72–992). We hereby waive, on our own motion, the requirement in that Public Notice that all basic findings with respect to the policies adopted in Docket No. 16495 be made in conjunction with Commission action on the first application of the applicant's proposed system to be considered. We think this action is warranted in the circumstances pertaining to Western Union. See the Commission's letter of July 26, 1972 (FCC 72–686) granting Western Union a partial waiver of Section 319 of the Communications Act to permit it to enter into a contract for procurement of the satellites involved herein.

satellites proposed and that its proposal is consistent with Commission policy, except with respect to the unresolved questions discussed above. Furthermore, it appears that these facilities would not have an adverse impact on existing services, and that they would serve the public interest, convenience and necessity.

6. Accordingly, IT IS HEREBY ORDERED that the captioned application ARE GRANTED and that Western Union IS AUTHORIZED to construct three satellites, two operational and one spare, in accordance therewith, subject to the terms and conditions set forth below.

7. IT IS FURTHER ORDERED that said satellites shall be constructed to conform with the specifications and parameters set forth in the attachment hereto.

8. IT IS FURTHER ORDERED that these facilities shall be operated in accordance with all Commission policies adopted in Docket No. 16495 and all rules and policies subsequently made applicable to domestic satellite communications; provided, however, that the satellites authorized herein shall not be placed in orbit unless and until Western Union, upon appropriate application therefor, has been authorized to do so by the Commission subject to such terms and conditions it finds appropriate in the public interest. Such application shall be filed no later than 90 days prior to the anticipated launch date. and will not be granted unless we then find, or have previously found, that Western Union has complied with all of the policy requirements in Docket No. 16495, or has been granted a waiver for good cause shown.[6]

9. IT IS FURTHER ORDERED that the construction of the satellites authorized herein shall be completed, in accordance with the applications and specifications listed herein, no later than 24 months after the date of issuance of this authorization and that failure to complete construction within such time period shall result in automatic forfeiture of this authorization unless such construction period is extended by the Commission upon good cause shown.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

Attachment

SPECIFICATIONS AND PARAMETERS

	File No.	Call sign
Nature of service: Domestic fixed satellite service	1-DSS-P-71	KA 2 S
	2-DSS-P-71	KA 3 S
Class of station: Domestic fixed satellite space station	3-DSS-P-71	KA 4 S

[6] See: *Memorandum Opinion and Order* in Docket No. 16495 released on December 22, 1972 (FCC 72-1198), (e.g. footnotes 18 and 22); *Public Notice* re Processing Procedures issued on November 9, 1972 (FCC 72-992); *Second Report and Order* in Docket No. 16495 issued on June 26, 1972, 35 FCC 2d 844 (e.g., paragraph 31); *Proposed Second Report and Order Recommended by the Chief, Common Carrier Bureau*, appended to the Commission's *Memorandum Opinion and Order* issued on March 17, 1972 (34 FCC 2d 1).

Permittee: The Western Union Telegraph Co.
Location: (Geostationary orbital position to be assigned prior to launch)
Frequencies:

	Frequency range	
	Receive (MHz)	Transmit (MHz)
Transponder No.:		
1	5925–5965	3700–3740
2	5965–6005	3740–3780
3	6005–6045	3780–3820
4	6045–6085	3820–3860
5	6085–6125	3860–3900
6	6125–6165	3900–3940
7	6165–6205	3940–3980
8	6205–6245	3980–4020
9	6245–6285	4020–4060
10	6285–6325	4060–4100
11	6325–6365	4100–4140
12	6365–6405	4140–4180

Telemetry: 4190–4200 MHz
Command: 6420 MHz
Emissions and bandwidths:
Single carrier/transponder: 36000 F9
Two carriers/transponder: 10000 F9
Telemetry: 69 F9
Frequency tolerance: ±.002%
STABILIZATION: Spin
STATION KEEPING FUNCTIONS:
Orbital inclination: ≤0.1 degree
Antenna Axis attitude: ±0.1 degree
Longitudinal drift: ≤0.1 degree
POLARIZATION:
Transmit: perpendicular to spin axis
Receive: parallel to spin axis
Telemetry: perpendicular to communications antenna
Command: perpendicular to receive antenna
ANTENNAS: (mechanically despun assembly)
CONUS coverage: 60 inch diameter antenna multiple feeds producing a main beam 6.8 x 3.5 degrees
Alaska/Hawaii coverage: additional feeds producing beams of 2.8 degrees covering Alaska and Hawaii
Telemetry: dual mode, toroidal beam, omnidirectional
Command: toroidal beam, omnidirectional
EQUIVALENT ISOTROPICALLY RADIATED POWER (e.i.r.p.)
CONUS coverage: 33 dbw
Alaska/Hawaii coverage: 26 dbw
Telemetry: 5 dbw
MAXIMUM FLUX DENSITY AT EARTH'S SURFACE: The power flux density at the earth's surface produced by a Domestic Satellite shall not exceed the following values:
—152 dbw/m² in any 4 KHz band for angles of arrival between 0 and 5 degrees above the horizontal planes;
$-152 \text{ dbw/m}^2 + (\theta - 5)/2 \text{ dbw/m}^2$ in any 4 KHz band for angles of arrival θ (in degrees) between 5 and 25 degrees above the horizontal plane;
—142 dbw/m² in any 4 KHz band for angles of arrival between 25 and 90 degrees above the horizontal plane
These limits would be obtained under assumed free-space propagation conditions.